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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 559

CITY OF HARRISONVILLE, MISSOURI, PETITIONER,

vs.

W. S. DICKEY CLAY MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 19, 1932.

CERTIORARI GRANTED JANUARY 16, 1933.

(37,256)

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1932, of said Court, before the Honorable Kimbrough Stone and the Honorable William S. Kenyon, Circuit Judges, and the Honorable William A. Cant, District Judge.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the thirtieth day of June, A. D. 1931, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the City of Harrisonville, Missouri, was Appellant and W. S. Dickey Clay Manufacturing Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

a

Citation.

In the District Court of the United States for the Western Division of the Western District of Missouri.

W. S. Dickey Clay Manufacturing Company, Plaintiff,
No. 1201. vs. In Equity.
City of Harrisonville, Missouri, a municipal corporation, and Missouri Pacific Railroad Company, Defendants.

United States of America—ss.

To W. S. Dickey Clay Manufacturing Company—Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eighth Circuit to be holden at St. Louis, Mo., on the 15th day of November in the year nineteen hundred and thirty, pursuant to an order allowing an appeal filed in the clerk's office of the District Court of the United States for the Western District of Missouri, from a final decree signed, filed and entered on the 10th day of July, 1930, in that certain suit therein, being in equity No. 1201 wherein City of Harrisonville, Missouri, appellant is defendant and you are plaintiff and appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Merrill E. Otis, United States District Judge for the Western District of Missouri, this 8th day of October, 1930.

MERRILL E. OTIS,
U. S. District Judge for the Western District of Missouri.

In the absence of Judge Reeves from the Western Division and at his request.

Service of above paper acknowledged this 8th day of October, 1930.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Appellant.

Endorsed: Filed in U. S. District Court on Oct. 8, 1930.

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1 United States of America—Sct.

Be it remembered that heretofore, to-wit, at the regular April term of the United States District Court for the Western District of Missouri, and on the 31st day of August, 1928, there was filed in the office of the Clerk of said Court a Petition in the cause wherein W. S. Dickey Clay Manufacturing Company is plaintiff and City of Harrisonville, Missouri, a Municipal Corporation, and Missouri Pacific Railroad Company, a Corporation, are defendants, being cause No. 1201 In Equity.

Said Petition, filed August 31, 1928, is in words and figures as follows, to-wit:

2 Petition.

Comes now the plaintiff and states:

1. That it is a corporation duly authorized and existing under and by virtue of the laws of the State of Delaware, and that it is a citizen and resident of the State of Delaware and is not a citizen and resident of the Western Division of the Western District of Missouri; that the defendant City of Harrisonville, Missouri, is a municipal corporation and a city of the fourth class under and by virtue of the laws and statutes of the State of Missouri; that the defendant Missouri Pacific Railroad Company is a railroad corporation duly authorized and existing under and by virtue of the laws of the state of Missouri.

2. That this is a suit between citizens of different states and that the value of the matter in controversy herein exceeds the sum of $3,000.00 exclusive of interest and costs.

3. That the plaintiff is the owner of certain lands lying and situate within the Western Division of the Western District of Missouri in Cass County, Missouri, described as follows, to-wit:

That tract of land being at a point four (4) Chains and Three (3) Links North of the Southeast corner of the West Half (W. ½) of Lot Five (5) of the Northeast Quarter (N. E. ¼) of Section Five (5), Township Forty-four (44), Range Thirty-one (31); thence in a Northwesterly direction along the North line of the lands of Adolph Carlson (see Book 127, page 49, Recorder's Office) to the East side of the right of way of the Kansas City and Southern Railroad (now Frisco); thence in a Northeasterly direction along the East side of the right of way of said railroad to the North line of said Lot Five (5) of the Northeast Quarter (N. E. ¼) of said Section; thence East along said North line to the West side of the right of way of the Missouri Pacific Railroad; thence in a Southerly direction along the West side of the right of
3 way of said last named railroad to where said line crosses the East line of the West Half (W½) of said Lot Five (5); thence North to the place of beginning, excepting therefrom the right of way of the Missouri, Kansas and Texas Railroad;

That tract of land beginning on the South line of Lot Five (5) of the Northeast Quarter (N. E. ¼) of Section Five (5) Township Forty-four (44) Range Thirty-one (31), where said line intersects the West line of the right of way of the Missouri Pacific Railway, thence with said right of way line Northwardly about Two Hundred Seventy-three (273) Feet to the Southern line of land belonging to W. H. Shackelford, thence with said Shackelford's line Northwestwardly One Hundred Forty-seven (147) Feet, thence Southwardly about Three Hundred Twenty-five and Five Tenths (325.5) Feet to a point on the South line of said Lot Five (5) which point is One Hundred Forty-seven (147) feet West of the point of beginning, thence Eastwardly with the South line of Lot Five (5) aforesaid, One Hundred Forty-seven (147) feet to beginning, and containing Ninety-three Hundredths (.93) of an Acre;

The East Half (E. ½) of the West Half (W½) of Lot Four (4) of the Northeast Quarter (N. E. ¼) of Section Five (5) Township Forty-four (44), Range Thirty-one (31), except right of way of railroad;

All that part of the East Half (E½) of the West Half (W-½) of Lot Three (3) of the Northeast Quarter (N. E. ¼) of Section Five (5), Township Forty-four (44), Range Thirty-one (31), which lies West of the right of way of the L. & S. Division of the Missouri Pacific Railway, containing Fourteen and Seventy-one Hundredths (14.71) Acres, more or less, in Cass County, Missouri;

All that part of Lot Two (2) of the Northeast Quarter
4 (N. E. ¼) of Section Five (5) which lies West of the Lexington and Southern Branch of the Missouri Pacific Railroad;

Also, commencing at a point on the South line of said Lot Two (2), which is Eight Hundred (800) Feet East of the East line of the right of way of said Railroad, thence North Eight Hundred (800) Feet, thence West to a point in the East line of said right of way which is Eight Hundred (800) Feet North of the South line of said Lot Two (2) aforesaid, thence in a Southerly direction along the East Line of said right of way to the South line of said Lot Two (2), thence East Eight Hundred (800) Feet to the beginning; all in Township Forty-four (44), Range Thirty-one (31);

Beginning at a point Seven Hundred and Seventy (770) Feet West from the Southeast corner of Lot Two (2) of the Northwest Quarter (N. W. ¼) of Section Five (5), Township Forty-four (44), Range Thirty-one (31), running thence East Seven Hundred Seventy (770) Feet, to the Southeast corner of said Lot Two (2), thence North Eight Hundred Fifty (850) Feet, thence in a Southwesterly direction to place of beginning, and containing Seven and one-half (7½) Acres, more or less;

All of Lot One (1) of the Northwest Quarter (N. W. ¼) of Section Five (5) Township Forty-four (44), Range Thirty-one (31) except a tract described as follows:

Beginning at the Southeast corner of the West Half (W. ½) of said Lot One (1), of the Northwest Quarter (N. W. ¼), running thence North Twenty (20) Rods, thence South Twenty (20) Rods, thence East Sixteen (16) Rods to the beginning, and known as Glenn Burial Ground;

Beginning on the West Line of Lot One (1) of the Northeast Quarter (N. E. ¼) of Section Five (5), Township Forty-four (44), Range Thirty-one (31), at a point One Hun-
5 dred (100) Feet South of the Northwest corner of said Lot One (1) running thence North to the Northwest corner of said Lot, One (1), running thence East along the North line of said Lot One (1), a distance of Three Hundred (300) Feet, running thence on a straight line in a Southwesterly direction to the point or place of beginning, containing Thirty-four Hundredths (.34) of an Acre, more or less;

All that part of Lot One (1) of the Northeast Quarter (N. E. ¼) of Section Five (5), Township Forty-four (44),

Range Thirty-one (31) lying East of the right of way of the Missouri Pacific Railroad;

Beginning at the Northwest corner of Lot One (1) of the Northwest Quarter (N. W. ¼) of Section Four (4), Township Forty-four (44), Range Thirty-one (31), running thence South Eighty Rods, thence East Ten and Five-tenths (10.5) Rods, thence North Eighty (80) Rods, thence West ten and five-tenths (10.5) Rods to the beginning and containing Five and Twenty-five Hundredths (5.25) Acres, more or less;

The North Half (N. ½) of the Northeast Quarter (N. E. ¼) of the Southeast Quarter (S. E. ¼) of Section Five (5), except Two (2) Acres in the Southwest corner thereof, Sixteen (16) Rods East and West by Twenty (20) Rods North and South; and

The West Five (5) Acres of the North Half (N. ½) of the Northwest Quarter (N. W. ¼) of the Southwest Quarter (S. W. ¼) of Section Four (4), all in Township Forty-four (44), Range Thirty-one (31);

The South Sixty (60) Acres of the West Half (W. ½) of the Southwest Quarter (S. W. ¼) of Section Four (4), in Township Forty-four (44), of Range Thirty-one (31).

6 4. That the right-of-way of the defendant Missouri Pacific Railroad Company runs through and over plaintiff's said land.

5. That the said land is farm and pasture land; that a water-course runs through the said land, known as Town Creek; that prior to the things and matters charged against the defendants herein, the waters of said water-course were clear, sweet, pure and unpolluted and entirely fit for consumption as drinking water by man and beast; that the said water-course meanders through a large part of the plaintiff's said farm, to-wit, about 150 acres thereof, which constituted and were prior to the things and matters charged against the defendants herein, a creek pasture of great value to the plaintiff herein; that the said creek pasture was formerly used for the grazing of blooded cattle and other livestock of great value and worth.

6. That said Town Creek is a small water-course which in seasons of drouth becomes all but dry except a few pools along the course; that, however, the normal flow of said stream and the water in said pools would be, except for the things and matters charged against the defendants herein, sufficient for

the requirements of plaintiff in its uses of the land through which the said creek runs.

7. That plaintiff's said creek pasture lies immediately West of the said right-of-way of the defendant Missouri Pacific Railroad Company; that at one point in the meanderings of said Town Creek, the said creek runs within a foot or so of the West line of the said right-of-way; that immediately opposite said point and within a few feet of the East line of said right-of-way the defendant City of Harrisonville has constructed and maintains a tank for the reception and collection of sewage; that the said City of Harrisonville is a city of over 2,000 inhabitants and that the sewage from the sanitary sewer mains, lines and pipes in said city is carried to the said tank.

8. That the said tank is of the type known as "Imhoff". The process of sewage disposal in such a tank is as follows: The raw sewage flows into two settling compartments of the tank so constructed that a percentage of the solids in the sewage will settle into a third and lower compartment of the tank in which a process of digestion and decomposition takes place. This third compartment is referred to as the sludge or digestion compartment. As this last mentioned compartment fills with the decomposed and decomposing solids from the sewage, it is from time to time emptied out into an open bed referred to as a sludge bed, where it is spread out to dry. From time to time the dry sludge from this bed must be removed to make room for new supplies from the sludge or digestion compartment of the tank. The liquid and solid sewage matter which does not settle into the compartments of the tank are not subjected to any further treatment but are simply discharged from the tank into such outlet as may be provided. The foregoing is a brief statement of the normal operation of any Imhoff tank.

9. An Imhoff tank is a method of primary sewage disposal. Such a tank is not supposed to remove in excess of sixty per cent of the putrescible organic matter in sewage and the effluent from such a plant or tank when discharged will, unless subjected to further treatment, putrefy, emit noxious gases, odors and fumes, injurious to both animal and vegetable life, and will when passed into a small water-course like the aforesaid Town Creek, so pollute and contaminate, the same that its waters are unfit for consumption by man or beast.

10. The effluent from such a primary disposal process as the Imhoff tank should be subjected to further and
8 secondary treatment. This may be done in several ways, of which examples are the sprinkling filter system or the activated sludge plant system. In either of these secondary disposal methods a process of oxidation of the putrescible organic sewage matter is so completed that the effluent will be stable and may be discharged into a watercourse without polluting or contaminating the same so as to render the water unfit for consumption and without creating noxious gases, odors and fumes injurious to animal and vegetable life. There are also other adequate methods of secondary sewage disposal. Furthermore, within a mile or so of the City of Harrisonville and within less than five miles thereof, there is the Grand River, a stream of sufficient volume and size to adequately handle, care for and dispose of the effluent from the city's sewage system without creating the nuisance conditions hereinafter alleged.

11. In constructing the aforesaid Imhoff tank at the point aforesaid, the City of Harrisonville, with the consent and permission of the defendant Missouri Pacific Railroad Company, carried and piped the effluent from said tank underneath the railroad embankment of the said Railroad Company, so that the effluent from said tank discharges onto the west side of said railroad right-of-way at the point aforesaid at which the said Town Creek comes to within a foot or so of the said right-of-way. At this point of discharge the topography is such that the discharge must and does flow immediately and directly into the said creek; that the defendants are encroaching and trespassing upon the lands of the plaintiff and have taken, ruined and destroyed said water-course for the uses and purposes of the same to which plaintiff is entitled, and have impaired and destroyed the value of plaintiff's land without right or authority of law, and the said defendant municipal corporation has and is attempting to take
9 the plaintiff's private property or to damage the same for public use without just compensation in violation of Section 21, Article 2, and Section 30 Article 2 of the Constitution of Missouri and of Article 5 and Section 1 of Article 14 of the Amendments to the Constitution of the United States.

12. The defendants are creating and maintaining a nuisance to the special and peculiar injury and damage of the plaintiff as follows, to-wit:

(a) The said Imhoff tank and sludge drying bed, comprising the only disposal plant now operated by the defendant city, are of insufficient size to give the results which should be obtained from such a plant of proper size, functioning normally under reasonable operating conditions.

(b) The said Imhoff tank is not properly operated in that weeds to the height of three feet, grass and tomato plants are allowed to grow in the sludge bed, thereby interfering with the operation of the air and sun in the process of drying the sludge; also grass is allowed to grow on the dry scum in the gas vent at the top of the sludge or digestion compartment of the tank.

(c) The sludge accumulations in the tank are excessive, as shown by the rising of gas bubbles in the settling compartments.

(d) The sewage accumulated in said tank becomes highly septic and emits strong odors of hydrogen sulphide and other noxious odors, gases and fumes.

(e) The sludge bed on which sludge from the tank is discharged to dry is grossly inadequate in size and area.

(f) The sludge or digestion compartment of the tank into which solids settle from the settling compartment is insufficient in size and capacity to take care of the normal sewage flow from the said city.

(g) By means of a by-pass a large amount of sewage and a high percentage of the total sewage from said city is not carried through the Imhoff tank at all but is simply carried around the tank and discharged directly into the said creek at the outlet point aforesaid without having been subjected to any purification process whatsoever.

13. By reason of the improper construction, operation and maintenance of the aforesaid Imhoff tank, and by reason of the failure and refusal of the said city to construct and maintain more than a primary disposal system for its sewage, and by reason of the failure and refusal of the city to construct, maintain and operate proper and adequate secondary disposal facilities for its sewage, a nuisance is created at and by the said Imhoff tank and in the said water-course running through plaintiff's land in that noxious odors, gases and fumes arise from the said tank and from the said stream polluting the air on and about the plaintiff's farm for a distance of three-quarters of a mile from the said tank and

the said stream; the waters of said stream are polluted and contaminated and are made milky colored in parts and black in others; solid sewage matter is plainly visible in the waters, gas bubbles are constantly emitted from the stream, sewage collects into pools which become black, slimy and odorous; these conditions obtain not only at and near the sewage outlet, but for a great distance down the water-course.

14. By reason of the foregoing, the value and worth of a large part of plaintiff's pasture lands lying along the said water-course is completely destroyed, cattle and other live-stock will not remain in the vicinity of the stream on account of the noxious odors, vapors and gases emitted therefrom, the water is unfit for consumption. The plaintiff has
11 no other water supply for its said pasture land, so that the value and worth of the same have been and will be, during the continuance of the said nuisance, wholly destroyed. The air and atmosphere not only in the vicinity of the stream but also for the distance of three-quarters of a mile therefrom, and in and about the dwelling house located upon said land is polluted and contaminated with noxious odors, vapors and gases so that the ease, comfort, health and life of persons residing in and upon and working on said land are endangered and jeopardized.

15. Plaintiff states that the aforesaid conditions and the nuisance created thereby have been brought to the attention of the defendant City of Harrisonville and the defendant Missouri Pacific Railroad Company, and that requests and demands have been made upon them to remedy the same but that they have wilfully failed and refused to do so, that the defendant city has ample power and authority under and by virtue of the laws of the State of Missouri, to construct, maintain and operate an adequate sewage disposal plant as aforesaid, but that it continues to fail and refuse to do so and allows the aforesaid nuisance to continue, and that the defendant Railroad Company acquiesces in and permits the same and actually participates therein as aforesaid.

16. That by reason of the aforesaid nuisance and all of the things and matters charged against the defendants herein, and by reason of the loss of the use, occupation and enjoyment of the plaintiff's aforesaid pasture land, and by reason of the discomfort, annoyance, suffering and jeopardy to life and health occasioned by the aforesaid odors, gases, vapors and smells created by the said nuisance in and upon the plaintiff's said land, and by reason of the labor and expense

involved in restoring said watercourse to a pure and proper condition, the plaintiff has been and is damaged in the
12 sum of Twenty-five Thousand ($25,000.00) Dollars.

17. That the plaintiff has no adequate remedy at law for the grievance aforesaid, and in order to avoid a multiplicity of suits invokes the jurisdiction of a court of equity; that plaintiff will suffer irreparable injury and damage unless further maintenance of the nuisance aforesaid is enjoined.

Wherefore, the plaintiff prays judgment against the defendants, and each of them, in the sum of Twenty-five Thousand ($25,000.00) Dollars, and that the defendants, and each of them, be perpetually enjoined from the discharge into the said watercourse upon the plaintiff's land of raw sewage and/or of the effluent from an improper, inadequate and insufficient sewage disposal plant, and that the defendant City of Harrisonville be given a reasonable time to construct and place in operation a sufficient and adequate sewage disposal plant or to make such other disposal of its sewage as may be necessary and proper, and for such other and further relief as to the court shall seem meet and proper.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

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13 Separate Answer of Defendant, City of Harrisonville.

Now comes the defendant, City of Harrisonville, Missouri, and for its separate answer herein admits that it is a municipal corporation, a city of the fourth class, under and by virtue of the laws and statutes of the State of Missouri, but denies that the value of the matter in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

This defendant further admits that plaintiff is the owner of the real property described in the plaintiff's petition and admits that the right-of-way of defendant, Missouri Pacific Railroad Company, runs through and over plaintiff's said land. This defendant further admits that the said land is pasture land and that a water-course runs through said land known as Town Creek, but this defendant denies that prior to the construction and operation of the sewer system in question, the waters of said watercourse were clear, sweet, pure and unpolluted or fit for consumption as drinking water

by human beings. And this defendant denies that the creek in question has been of great value to the plaintiff.

This defendant admits that said Town Creek in seasons of drouth becomes all dry except a few pools along the course, but this defendant denies that the normal flow of said stream and the water [is] said pools would be sufficient for the requirements of plaintiff in its uses of the land through which the creek runs.

This defendant admits that the creek and pasture in question lies immediately west of the right-of-way of the defendant Missouri Pacific Railroad Company, and that at one point in the meanderings of said Town Creek the same runs within a foot or so of the west line of the said right-of-
14 way, and admits that substantially opposite this point and within a few feet of the east line of the right-of-way of the defendant, Missouri Pacific Railroad Company, this defendant has constructed and is maintaining certain portions of its sewer system which serves the City of Harrisonville, a city of over two thousand (2,000) inhabitants. And this defendant further admits that the disposal tank thus located is of the type known as "Imhoff," but denies that any solid matter is discharged into the outlet of said tank and denies that any of the effluent from such tank putrefies or emits noxious gas odors or fumes injurious to animal or vegetable life and denies that when the same is passed in to the said Town Creek it so pollutes and contaminates the same that it is unfit for consumption by man or beast, and denies that said effluent should be subjected to further and secondary treatment, and denies that it is practicable for the City of Harrisonville to conduct its sewage to the Grand River.

This defendant further admits that discharge from said tank in question is carried by pipes under the right-of-way of the Missouri Pacific Railroad Company and discharge on the west side of said railroad right-of-way at a point within a foot or two of said right-of-way into the said Town Creek and that the same does flow into said creek, but this defendant denies that it is encroaching and trespassing upon the lands of the plaintiff or has taken, ruined or destroyed said water-course for the normal purposes thereof or has impaired or destroyed the value of plaintiff's land, and this defendant denies that it has or is attempting to take plaintiff's private property or to damage the same for public use without just compensation to the plaintiff and denies that it is creating or maintaining any nuisance to the special and peculiar injury or damage of the plaintiff.

15 This defendant further denies that the construction, operation and maintenance of said Imhoff tank is in any way improper. And this defendant denies that it has polluted the said stream or has polluted the air about the plaintiff's farm for a distance of three-quarters of a mile from said point or for any other distance, and this defendant denies that the value and worth of plaintiff's pasture lands lying along said water-course has been completely destroyed and denies that cattle or other livestock will not remain in the vicinity of said stream on account of the alleged noxious odors and gases, and denies that the water is unfit for the consumption of said cattle, and denies that plaintiff has no other water supply for said pasture land and denies that the health and life of persons residing in or working on said land are in any way endangered or jeopardized in the maintenance of said sewer plant.

And this defendant denies that the plaintiff has been damaged in the sum of Twenty-five Thousand ($25,000.00) Dollars or any other sum, and denies that plaintiff is without any adequate remedy at law for the alleged injury and denies that this is an action within the jurisdiction of the court of equity, but alleges that this is an effort by the plaintiff herein to combine an action in law with an action in equity, and denies that there is any justification for such character of action.

Wherefore, this defendant prays that it may go hence with its costs.

ALLEN B. GLENN,
RAYMOND G. BARNETT,
Attorneys for defendant, City of Harrisonville, Missouri.

Received copy of the above answer this 25th day of September, 1928 and consent given that same may be filed not later than Sept. 26, 1928.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for plaintiff.

Filed in the United States District Court, Sept. 26, 1928.

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16 Separate Answer of Missouri Pacific Railroad Company.

1. Now comes the defendant, Missouri Pacific Railroad Company, and denies knowledge of the facts averred in

Paragraph 1 of said petition, except that it admits that the defendant, City of Harrisonville, is a municipal corporation and a city of the fourth class, and admits that the defendant, Missouri Pacific Railroad Company is a railroad corporation organized and existing under the laws of the State of Missouri.

2. This defendant denies knowledge of the facts averred in Paragraph 2 of said petition.

3. This defendant denies knowledge of the facts averred in Paragraph 3 of said petition.

4. This defendant admits that it owns a railroad right-of-way which adjoins parts of the lands described in the plaintiff's petition.

5. This defendant denies knowledge of the facts averred in Paragraph 5 of plaintiff's petition.

6. This defendant denies knowledge of the facts averred in Paragraph 6 of plaintiff's petition.

7. This defendant denies knowledge of the facts averred in Paragraph 7 of plaintiff's petition except this defendant admits that there is a pasture west of defendant's right-of-way and a creek runs up to the defendant's right-of-way line, and that the said city of Harrisonville has constructed and maintains a tank for the reception and collection of sewage, and admits that the City of Harrisonville is a city of over Two Thousand inhabitants, but avers that it is a city of less than thirty thousand inhabitants.

8. This defendant denies knowledge of the facts averred in Paragraph 8 of the plaintiff's petition.

9. This defendant denies knowledge of the facts
17 averred in Paragraph 9 of said petition.

10. This defendant denies knowledge of the facts averred in Paragraph 10 of plaintiff's petition.

11. This defendant denies knowledge of the facts set forth in Paragraph 11 of the plaintiff's petition.

This defendant avers that the City of Harrisonville is and was at all of the times mentioned in the plaintiff's petition, a city of less than thirty thousand inhabitants; that the legislative body of said city did pass an ordinance declaring that it deemed it necessary to construct a sewer system, public or district sewer, to facilitate the proper drainage of such city; that in pursuance of said ordinance said City of Harri-

sonville did duly adopt plans, specifications and profile showing the points of intersection of such sewer with defendant's railroad right-of-way; also the grade of the bottom of the sewer, its breadth and depth, with a general statement of the materials to be used in its construction, and thereupon said city caused a copy of said plans, specifications and profile and general statement aforesaid to be served on this defendant; that in accordance therewith and in compliance with Section 8787 of the Revised Statutes of Missouri for 1919, this defendant was obligated to give its consent to and permit said City to construct the said sewer under this defendant's right-of-way at said place. This defendant further avers that it has no control whatever of the management or operation of said sewer nor any part thereof, but the said sewer is in the sole possession, custody and operation, and is maintained by the said City of Harrisonville for the benefit of its inhabitants to facilitate the proper drainage of said City.

12. This defendant denies knowledge of the facts averred in Paragraph 12 of the petition except that it says that if there be any nuisance maintained, as averred in said petition, it was not maintained by this defendant but is maintained solely by the City of Harrisonville, Missouri.

13. Defendant denies knowledge of the facts averred in Paragraph 13 of the petition.

14. Defendant denies knowledge of the facts averred in Paragraph 14 of the petition.

15. Defendant denies knowledge of the facts averred in Paragraph 15 of the petition, except that defendant admits that the plaintiff made complaint to this defendant about said sewer, but this defendant explained to the plaintiff that this defendant had no interest or control, in any degree in the maintenance and operation of said sewer, and had no power to prevent the said City from passing the same under its tracks and right-of-way and of maintaining the same, inasmuch as the said City of Harrisonville, in so doing, was exercising a right conferred upon the said city by the statutes of the State of Missouri.

16. Defendant denies knowledge of the facts averred in Paragraph 16 of plaintiff's petition.

17. Defendant denies knowledge of the facts averred in Paragraph 17 of plaintiff's petition.

Wherefore, this defendant asks to be discharged with its costs.

HACKNEY & WELCH,
Attorneys for defendant, Missouri Pacific Railroad Company.

Filed in the United States District Court Sept. 29, 1928.

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19 (Decree, July 10, 1930.)

This cause came on to be further heard at this term and was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows:

1. The Court finds the issues upon the plaintiff's bill of complaint in favor of the plaintiff and against the defendants.

2. The Court finds that the effluent from the sewage system and the sewage disposal plant of the defendant City of Harrisonville is discharged into Town Creek, a watercourse flowing through and upon the land of the plaintiff; that such effluent pollutes and contaminates said Creek [endering] it filthy and creating in said Creek and upon and over the land of the plaintiff noxious and offensive odors; that by reason of the discharge of said effluent into the said watercourse a nuisance is created in said watercourse in and upon plaintiff's land.

3. The Court finds that it is unnecessary for the defendant City of Harrisonville to discharge raw or partially treated sewage into the said watercourse upon plaintiff's land, and that the defendant City may by use of reasonable means available to said defendant city abate the said nuisance, and that six months time from the date of this decree is a reasonable time within which the said defendant city may abate said nuisance.

4. The Court finds that by reason of the said nuisance and the continuance thereof to date plaintiff has been damaged by loss of rents and profits from its said land in the sum of five hundred dollars ($500.00) and by reason of the cost and expense of restoring said Creek to the condition in which it existed prior to the creation of said nuisance by said defendant city in the sum of Three Thousand Five Hundred Dollars ($3,500.00).

5. The Court finds that the defendant Missouri Pacific
20 Railroad Company is a proper party defendant by reason of the fact, which the Court finds, that the defend-

ant City of Harrisonville has piped the outflow from its sewage system and sewage disposal plant through the right of way of said defendant Missouri Pacific Railroad Company and is discharging the said sewage matter, which causes the said pollution and contamination in said watercourse, onto the said right of way at a point approximately on the line of plaintiff's said property, from which point the said sewage matter flows directly into said watercourse upon said plaintiff's land. The defendant Missouri Pacific Railroad Company was however bound by statute to permit the use of its right of way for a sewage line and the said defendant Railroad Company is guilty of no wrong in connection with the said wrongful acts of the defendant city. However, jurisdiction should be and is hereby retained over said defendant railroad pending compliance with the order and decree herein made against said defendant city.

Wherefore, it is Ordered, Adjudged and Decreed, that plaintiff have and recover of the defendant city of Harrisonville the sum of four thousand dollars ($4,000.00) with interest thereon at the rate of six per cent (6%) per annum from this date with costs to said plaintiff to be taxed, and that plaintiff have execution therefor. It is further ordered, adjudged and decreed that the defendant City of Harrisonville be and it is hereby enjoined from the discharge of putrescible sewage matter into said watercourse in, on or above said plaintiff's land; provided, however, and it is further ordered, adjudged and decreed that the said defendant be, and it is hereby given a period of six months from the date of this decree in which to abate the said nuisance by such adequate and effective method or methods as the said defendant City may select to prevent, cease and determine the dis-
21 charge of putrescible sewage matter into the said watercourse in, on or above said plaintiff's land. It is further ordered, adjudged and decreed that and the Court hereby reserves jurisdiction of this cause for the rendition of such further orders with respect to enforcement and execution of this judgment and decree as shall be deemed by the Court necessary in the premises. To all of which judgment, order and decree the defendants except.

Dated July 10, 1930.

ALBERT L. REEVES,
District Judge.

Filed in the United States District Court July 10, 1930.

22 Notice of Petition for Appeal

To the Honorable Maurice H. Winger, P. E. Reeder, Frank P. Barker, Alton Gumbiner and Leland Hazard:

You are hereby notified that the defendant in the above entitled action, City of Harrisonville, Missouri, is filing in the above entitled court its petition for appeal from the decree of the Honorable Albert L. Reeves, Judge of said court, entered in the above entitled action on the 10th day of July, 1930, and that the said defendant, City of Harrisonville, Missouri, will on Wednesday, October 8, 1930, at nine o'clock A. M., or as soon thereafter as counsel may be heard, present in said District Court at Kansas City, Missouri, its said petition for appeal to the said Honorable Albert L. Reeves, District Judge, if he be then and there sitting, and if not then to the Honorable Merrill Otis, District Judge of said court, if he be then sitting, and ask that said appeal be allowed and that pending the determination of said appeal the said decree of July 10, 1930 be suspended and that said court make its order relating to the security to be given by said defendant.

RAYMOND G. BARNETT
ALLEN B. GLENN
Attorneys for City of Harrisonville, Missouri, Defendant and Appellant.

Received a copy of the above notice this 6th day of October, 1930.

WINGER, REEDER, BARKER, GUMBINER & HAZARD,
Leland Hazard
Maurice H. Winger
Attorneys for Plaintiff.

Filed in the United States District Court Oct. 7, 1930.

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23 Petition for Appeal

To the Honorable Albert L. Reeves, District Judge:

The above named defendant, City of Harrisonville, Missouri, a municipal corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 10th day of July, A. D. 1930, does hereby appeal from said decree to the Circuit Court of Appeals for the 8th Circuit

of the United States, for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 8th Circuit, sitting at St. Louis, Missouri, under the rules of such court in such cases made and provided. And your petitioner further prays that such appeal operate as a supersedeas and that during the pendency of such appeal all proceedings for the enforcement of the said decree be suspended, and further prays that the proper order relating to the required security to be required of it be made.

RAYMOND G. BARNETT
ALLEN B. GLENN
Attorneys for defendant and appellant
City of Harrisonville, Missouri.

Filed in the United States District Court Oct. 7, 1930

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24 Assignment of Errors.

Now comes the defendant, City of Harrisonville, Missouri, in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this honorable court on the 10th day of July, 1930.

I.

That the United States District Court for the Western Division of the Western District of Missouri erred in overruling the objection of said defendant and appellant to the introduction of any evidence under the petition and the motion interposed by the said defendant and appellant at the beginning of the trial to dismiss said action on the ground that the petition disclosed that plaintiff had no cause of action for equitable relief, but that the action accruing to the property owner, if any, on account of the alleged nuisance was an action at law for original damages on account of a permanent nuisance.

II.

That said court erred in overruling the objection of said defendant to the evidence of the plaintiff of the value of the herd of cattle upon the land in question on the ground that such value constituted no element of a proper measure of damages.

III.

That said court erred in overruling the objection of said defendant to the evidence of the plaintiff of the cost of improvements made upon the land in question and neighboring land on the ground that the cost of such improvements constituted no element of a proper measure of damages.

IV.

That said court erred in overruling the objection of said defendant to the testimony of the plaintiff's witness, W. S. Dickey, concerning the fair rental value of the land if the water were unpolluted, the ground of said objection being that the witness was not a competent witness on said matter, and that contrary to the evidence the question assumed that except for said defendants' disposal plant the waters of the creek in question were pure and undefiled.

V.

The court erred in overruling the objections of said defendant to the evidence of the plaintiff concerning methods of secondary treatment for sewage, the ground of such objection being that the right to determine the type of sewage disposal plant to be erected lay within the province of the legislative representatives of the city and beyond the proince of the court to modify it.

VI.

Said Court erred in overruling the objection of said defendant to the evidence of the plaintiff concerning the reasonable rental value of the land in question, the ground of objection being that said question was made applicable to town cows when the evidence failed to show any market for said pasture for such use and further that the defendant's disposal plant in question if a nuisance at all was, under the pleadings and the plaintiff's own evidence, a permanent nuisance, in which event the measure of damages was not the rental value of the land but its diminution in reasonable market value, if any, caused by such alleged nuisance.

VII.

Said court erred in overruling the objection of said defendant and the motion of said defendant to strike out all of the testimony relative to the value of said land for the pasturage of town cows, the ground of said objection and motion being that the evidence failed to show any market for said land for said purpose and that said evidence was not within any issue raised by the pleadings.

26 VIII.

Said court erred in overruling the objection of said defendant to the evidence of the plaintiff concerning secondary treatment for the effluent from the disposal plant in question, the ground of said objection being that the character of the disposal plant was a matter for determination by the city authorities within their discretion and not a matter for determination by the court, and that if any nuisance had been created by such disposal plant the remedy of the property owner in such case was an action for damages as for a permanent nuisance.

IX.

Said court erred in overruling the objection of said defendant to the evidence of the plaintiff that the Health Department of Missouri had, subsequent to the erection of the disposal plant, recommended some additional treatment for the effluent therefrom, the ground of such objection being that it was immaterial what might be the recommendations of the Health Department, that the question was one merely of what might be required by law.

X.

That said court erred in overruling the objection of said defendant to the evidence of plaintiff concerning the cost of removing objectionable deposits in the stream in question, the ground of said objection being that by the plaintiff's own evidence it appeared that if defendant were guilty of maintaining any nuisance at all, such nuisance was a permanent nuisance, and the measure of damages accruing to the owner of land damaged thereby was the decrease in the value of his land caused by the erection of such permanent nuisance.

XI.

Said court erred in overruling the motion of said defendant made at the close of plaintiff's case to dismiss said action, the ground of said motion being that under the
27 . pleadings and the law and the evidence it appeared that plaintiff had no such cause of action as it sought to assert, that if any injury arose to the plaintiff's land from the operation of the disposal plant in question such injury was inherent in the use of the plant from its very beginning, constituting the same a permanent nuisance, and that the relief of the land owner for such invasion, if any, of his rights was an action at law for damages for the diminution of the value of his land by reason of the operation of said plant, and that said plant served the general public

convenience and must, as against an individual asserting property damage, be held, if held to be a nuisance at all, a permanent nuisance for which equity provided no relief, but for which the land owner was remitted to an action for damages as for a permanent nuisance, and further upon the ground that under the petition and the evidence it appeared that plaintiff sought an order modifying the present disposal plant notwithstanding that such an order was beyond the jurisdiction of the court and notwithstanding that plaintiff's evidence failed to show that said defendant was financially able to construct such a supplementary plant or that under the condition of its finances and the limitations of the Constitution of the State of Missouri it had the financial means or the power to build such a secondary plant.

XII.

Said court erred in sustaining the objection of the plaintiff to the Exhibit H. offered in evidence by said defendant, said exhibit being the report of a pathological laboratory on certain specimens submitted for analysis, the plaintiff's objection being that it was hearsay.

XIII.

Said court erred in entering its finding and decree in
28 favor of the plaintiff herein for the following reasons:

A. It erred in finding that because the effluent from the disposal plant in question polluted the stream in question it constituted a nuisance upon the plaintiff's land, when the issue of fact was whether the effluent polluted the stream more than the pollution therein present before the erection of the plant.

B. It erred in finding without support of evidence and contrary to the evidence that reasonable means were available to the defendant, City, to abate the alleged nuisance.

C. It erred in finding contrary to the evidence that the plaintiff has been damaged by the loss of rents and profits on said land during said period in the sum of $500.00.

D. It erred in finding that the cost of removing the objectionable deposits from said creek, said to be $3500.00, is an element of damage to the plaintiff.

E. It erred in finding that the alleged loss of rents and profits and the alleged cost of removing the alleged pollution from said creek is a proper measure of the damages alleged to have been occasioned to said land by the maintenance of said disposal plant.

F. It erred in enjoining the defendant, City, from the further use after the expiration of six months of the said disposal plant, a structure which is to said city a sanitary necessity.

G. It erred in requiring in effect that the defendant, City, erect an additional and supplementary disposal plant and in thus invading the legislative powers and discretion of the defendant, City.

H. It erred in awarding equitable relief upon pleadings and evidence showing that the structure in question,
29 if a nuisance at all, was a permanent nuisance, for any resulting damage from the operation of which the only proper action was an action at law by the owner of the property affected for original damages resulting from a permanent nuisance.

I. It erred in ignoring the financial and constitutional limitations upon the city preventing its compliance with the requirements in the decree for the erection of a supplementary plant.

J. It erred in ignoring the preponderating public convenience and necessity served by the structure in question when the complaint against the same was based upon mere property damage.

K. It erred in adjudging against the defendant, City, and in favor of the plaintiff a judgment for the lump sum of $4,000, and by the requirements of said decree for a supplementary disposal plant fastening upon the city an additional expenditure of $25,000 to $40,000, when by the terms of the decree itself it appears that plaintiff had been suffering damages because of the said structure not to exceed $100.00 a year.

L. It erred in fastening upon the defendant, City, by its decree the lump sum judgment of $4,000 plus the additional expenditure for a supplementary plant increasing the amount to $40,000 when by the undisputed evidence the total value of the land affected does not exceed $6,000, and the total damages done thereto by the perpetual maintenance of the disposal plant as it now is does not exceed $2,000.

Wherefore, this appellant prays that said decree be reversed and that said District Court for the Western Division of the Western District of Missouri be ordered to enter

a decree reversing the decision of the lower court in said cause.

30 RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for appellant.

Filed in the United States District Court Oct. 7, 1930.

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31 Order Allowing Appeal.

On the motion of Raymond G. Barnett and Allen B. Glenn, solicitors and counsel for defendant, City of Harrisonville, Missouri, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the 8th Circuit from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the 8th Circuit. It is further ordered that the bond on appeal be fixed at the sum of $1,000.00, the same to serve as a bond for cost and damages on appeal.

Dated October 8, 1930.

MERRILL E. OTIS, Judge.
In the absence of Judge Reeves from the Western Division and at his request.

Filed in the United States District Court Oct. 8, 1930.

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32 Order, Nov. 6, 1930, Extending Time to File Transcript.

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 31st day of December, 1930.

MERRILL E. OTIS,
United States District Judge for the Western District of Missouri.

Filed in the United States District Court Nov. 6, 1930.

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33 **Bond On Appeal.**

Know All Men By These Presents that we, City of Harrisonville, Missouri, as principal and Fidelity and Deposit Company of Maryland and as sureties of the County of Cass, State of Missouri are held and firmly bound unto W. S. Dickey Clay Manufacturing Company in the sum of $1,000.00 lawful money of the United States to be paid to it and its successors and assigns; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 16th day of October, 1930.

Whereas the above named City of Harrisonville, Missouri has prosecuted an appeal to the Circuit Court of Appeals of the United States, Eighth Circuit, to reverse the judgment and decree of the District Court for the Western District of Missouri in the above entitled cause.

Now Therefore, the condition of this obligation is such that if the above named City of Harrisonville, Missouri, shall prosecute its said appeal to effect and answer all costs and damages if it fail to make good its plea then this obligation shall be void; otherwise to remain in full force and effect.

(Seal) CITY OF HARRISONVILLE, MISSOURI,
By Lee Spicer, Mayor,
Principal and appellant.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By G. H. Burnett, Attorney in Fact,
Sureties.

34 The within bond is approved both as to sufficiency and form this ..... day of October, 1930.

.....
Judge of the District Court of the United States for the Western District of Missouri.

Filed in the United States District Court Nov. 10, 1930.

35 Notice of Submission of Appeal Bond for Approval.

To the Plaintiff (Appellee) or its Attorneys of Record: Maurice Winger and Leland Hazard:

You are hereby notified that on the 22nd day of November, 1930, at 9:30 o'clock A. M. or as soon thereafter as counsel may be heard, Defendant (Appellant) City of Harrisonville, Missouri, will submit to the Honorable Albert L. Reeves, Judge of the above court, or in his absence to the Honorable Merrill E. Otis, Judge of the above court, its appeal bond herein for the approval of the court.

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for City of Harrisonville, Missouri, Defendant and Appellant.

Received copy of the above notice this .... day of November, 1930.

. . . . . .
Attorney for Plaintiff (Appellee) W. S. Dickey Clay Manufacturing Company.

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36 State of Missouri,
County of Jackson—ss.

John R. James of lawful age being duly sworn upon his oath states that he delivered a copy of the within notice of submission of appeal bond for approval to Leland Hazard, one of the attorneys for the plaintiff in the above entitled cause, at his office in Kansas City, Missouri on Monday, November 10th, 1930.

JOHN R. JAMES.

Subscribed and sworn to before me this 14th day of November, 1930.

(Seal) ERMA REID,
Notary Public.

My commission expires Sept. 23, 1934.

Filed in the United States District Court Nov. 14, 1930.

37 Notice of Lodgment of Statement of Proceedings and Evidence.

To W. S. Dickey Clay Manufacturing Company, Plaintiff above and appellee on appeal and to its Attorneys of Record, Maurice Winger and Leland Hazard:

You are hereby notified that on November 10th, 1930, Defendant in the trial court and appellant in the appeal in the above entitled cause lodged in the office of the Clerk of the above entitled court its statement of the proceedings had and of the evidence offered upon the trial of said case and that on the 22nd day of November, 1930, at 9:30 o'clock A. M. or as soon thereafter as counsel may be heard, said Defendant, City of Harrisonville, will present such statement to the court and ask the court to approve the same as a just and true statement of the proceedings had and of the evidence offered upon the trial of the case.

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for City of Harrisonville, Missouri, Defendant in the above entitled cause and appellant in the appeal therein.

Received a copy of the above notice this 12 day of November, 1930.

WINGER, REEDER, BARKER, GUMBINER & HAZARD,
Attorneys for W. S. Dickey Clay Manufacturing Company, Plaintiff in the above entitled cause and appellee in the appeal therein.

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38 State of Missouri,
County of Jackson—ss.

John R. James of lawful age being duly sworn upon his oath states that he delivered a copy of the within notice of lodgment of statement of proceedings and evidence to Leland Hazard, one of the attorneys for the plaintiff in the above entitled cause, at his office in Kansas City, Missouri, on Monday, November 10th, 1930.

(Seal) JOHN R. JAMES.

Subscribed and sworn to before me this 14th day of November, 1930.

ERMA REID,
Notary Public.

My commission expires Sept. 23, 1934.

Filed in the United States District Court Nov. 14, 1930.

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39 Praecipe for Transcript.

To The Clerk of the Above Entitled Court:

You will please prepare for the purpose of appeal in the above entitled cause a transcript of the record therein and for such purposes you will please include the following documents together with the filing marks thereon.

1. The petition herein.

2. The answer of Defendant, City of Harrisonville, Missouri.

3. The answer of Defendant, Missouri Pacific Railroad Company.

4. The decree of the Court in said cause entered July 10, 1930.

5. The Court's opinion in the case.

6. The petition of Defendant, City of Harrisonville, Missouri for appeal.

7. The assignments of error filed by Defendant, City of Harrisonville, Missouri.

8. The notice of petition for appeal, together with the acknowledgment of service thereon.

9. The order allowing appeal.

10. The citation to plaintiff, W. S. Dickey Clay Manufacturing Company, together with the acknowledgment of service thereof appearing thereon.

11. The appeal bond, together with the approval of the court thereon.

12. The notice of submission of the appeal bond, together with the acknowledgment of service thereon.

13. The statement of the proceedings had and of the evidence offered upon the trial of the case.

14. Notice of lodgment of the statement of the proceedings and of the evidence offered upon the trial of the
40 case and of the intention to ask the court's approval thereof, together with the acknowledgment of service of such notice.

15. Court's approval of the statement of the proceedings had and of the evidence offered upon the trial of the case.

16. This praecipe together with the acknowledgment thereon of a service of a copy hereof.

17. Order enlarging the time for filing record on appeal.

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for Defendant above and Appellant on appeal, City of Harrisonville, Missouri.

Received a copy of the above praecipe this 12 day of November, 1930.

WINGER, REEDER, BARKER, GUMBINER & HAZARD,
Attorneys for Plaintiff above, appellee on this appeal, W. S. Dickey Clay Manufacturing Company.

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41 State of Missouri,
County of Jackson—ss.

John R. James of lawful age being duly sworn upon his oath states that he delivered a copy of the within praecipe for transcript to Leland Hazard, one of the attorneys for the plaintiff in the above entitled cause, at his office in Kansas City, Missouri, on Monday, November 10th, 1930.

JOHN R. JAMES.

Subscribed and sworn to before me this 14th day of November, 1930.

(Seal) ERMA REID,
Notary Public.

My commission expires Sept. 23rd, 1934.

Filed in the United States District Court Nov. 14, 1930.

42 (Stipulation as to Approval of Appeal Bond and Statement of Evidence)

It is hereby stipulated by the parties in this cause that the matter of approval of Appeal Bond and approval of Appellant's statement of proceedings had and evidence offered upon the trial, both of which matters were set for hearing in said Court on November 22nd, or as soon thereafter as Counsel may be heard, were by agreement continued for hearing until December 10th, 1930, at which time said matters will be presented to the Court.

It is further stipulated that Counsel for Plaintiff (Appellee) may have additional time in which to indicate additional portions of the Record to be incorporated in the transcript on Appeal; and appellant waives any and all objections to the allowance of such additional time by order of the Court or otherwise, and agrees that Plaintiff (Appellee) may have until December 10th for such purpose.

ALLEN B. GLENN,
RAYMOND G. BARNETT,
Attorneys for City of Harrisonville,
Defendant and Appellant.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff and Appellee.

Filed in United States District Court Nov. 29, 1930.

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43 (Order, Nov. 29, 1930, Extending Time for Plaintiff to Indicate Portions of Record to be Included in Transcript).

This Cause coming on to be heard on November 29th, upon the application of Plaintiff (Appellee) for additional time in which to indicate additional portions of the Record to be incorporated into the transcript on appeal, it is ordered, adjudged and decreed that Plaintiff (Appellee) have until December 10th in which to indicate additional portions of the Record to be incorporated into a transcript on appeal.

ALBERT L. REEVES, Judge.

Filed in the United States District Court Nov. 29, 1930.

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44 (Stipulation as to Further Continuance of Hearing of Approval of Bond on Appeal, etc.)

It is hereby stipulated by the parties to this cause that the matter of approval of appeal bond and approval of appellants' statement of proceedings had and evidence offered upon the trial, both of which matters were set for hearing in said court by agreement of counsel on December 10th, 1930, shall be continued for hearing until December 23rd. It is further stipulated that counsel for plaintiff (Appellee) will have additional time in which to indicate additional portions of the record to be incorporated in the transcript on appeal; and appellant waives any and all objections to the allowance of such additional time by order of the court or otherwise, and agrees that plaintiff (appellee) may have until December 23rd for such purposes; (both judges of the said court being absent from the city upon this date, a court order for the matters herein stipulated is waived by both parties).

Dated this December 10th, 1930.

CLEARY & BARNETT,
Attorneys for City of Harrisonville,
Defendant and Appellant.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for plaintiff and appellee.

Filed in the United States District Court Dec. 19, 1930.

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45 . (Order, Dec. 29, 1930, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of February, 1931.

ALBERT L. REEVES,
United States District Judge for
the Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court Dec. 29, 1930

46 (Order, Jan. 28, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the Clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of March, 1931.

ALBERT L. REEVES,
United States District Judge for
the Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court, Jan. 28, 1930.

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47 (Order, Feb. 25, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of April, 1931.

ALBERT L. REEVES,
United States District Judge for
the Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court Feb. 25, 1931.

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48 (Order, Mch. 28, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of May, 1931.

ALBERT L. REEVES,
United States District Judge for the
Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court Mch. 28, 1931.

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49 (Order, Apr. 24, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of June, 1931.

MERRILL E. OTIS,
United States District Judge for the
Western District of Missouri.

In the absence of Judge Reeves
from Kansas City.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court Apr. 24, 1931.

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50 (Order, May 27, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said case and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of July, 1931.

ALBERT L. REEVES,
United States District Judge for the
Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court May 27, 1931.

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51 (Stipulation as to Filing of Supplemental Praecipe, Etc.)

Whereas defendant, City of Harrisonville, Missouri, appellant from the decree of the court herein did heretofore lodge with the clerk of this court its statement of the proceedings had and of the evidence offered upon the trial of the case; and,

Whereas at the request of the plaintiff herein and appellee on appeal the parties have since that time collaborated in the preparation of a new statement of the proceedings had and of the evidence offered upon the trial of the case which they are offering jointly to the court as a substitute for that heretofore lodged with the court on November 10, 1930; and,

Whereas said appellant did heretofore on November 10, 1930 file herein its praecipe, having duly served a copy thereof upon appellee; and,

Whereas various stipulations have been filed and orders entered since the filing of said praecipe; and,

Whereas said appellant did heretofore on the 10th day of November, 1930, file herein its appeal bond in the sum of

$1,000.00 and serve notice thereof upon the appellee and of the time when it would apply to the court for the approval of said bond; and,

Whereas at appellee's request said matter has not heretofore been presented to the court; and,

Whereas the parties have now agreed between them that said appellant may file and shall file its appeal bond herein in the penal sum of $5,000.00 with the American Surety Company of New York as surety thereon;

Now Therefore, it is agreed between the parties here-
52 to that said appellant shall have leave to file a supplemental praecipe herein, a copy of which is hereto attached, and shall have leave to file said new appeal bond in the penal sum of $5,000.00 and take the court's approval thereon, appellee waiving any and all objections to the filing of such bond at this time and agreeing that in consideration of the filing thereof it will withhold any request for the enforcement of the decree herein entered by the District Court until the final determination of this case upon appeal.

WINGER REEDER BARKER
GUMBINER & HAZARD
Attorneys for plaintiff and appellee on appeal, W. S. Dickey Clay Manufacturing Company.

RAYMOND G. BARNETT
ALLEN B. GLENN
Attorneys for defendant and appellant on appeal, City of Harrisonville, Missouri.

Filed in the United States District Court June 15, 1931

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53 (Statement of Evidence.)

In the District Court of the United States for the Western Division of the Western District of Missouri.

W. S. Dickey Clay Manufacturing Company, Plaintiff,
In Equity vs. No. 1201.
City of Harrisonville, Missouri, a municipal corporation, and Missouri Pacific Railroad Company, Defendants.

This case came on regularly for trial before the Honorable Albert L. Reeves, one of the District Judges of the above court, on Tuesday, June 17, 1930, plaintiff being represented

by its counsel, Maurice Winger and Leland Hazard and defendant, City of Harrisonville, being represented by its counsel, Raymond G. Barnett, John R. James and Judge Allen Glenn, and defendant, Missouri Pacific Railroad Company being represented by its counsel, Glenn R. Donaldson. Statements were made to the court by counsel on behalf of each of the parties concerning the character of the case and the expectation of the parties of what the evidence would be. In the course of the statement made on behalf of the defendant, City of Harrisonville, attention was called to the fact that the sewer system and disposal plant in question, complained of by plaintiff, served the public convenience and the contention was made on behalf of said city of Harrisonville that the matter of public convenience would outweigh any question of private property damage to the extent that the continued use of said sewer system and disposal plant was not properly subject to injunction but that if any damage had been done the land in question owned by plaintiff the remedy therefor was not an action in equity to abate the use of said sewage system and disposal plant, but an action for damages as for a permanent nuisance. At the conclusion of the opening statements and prior to the introduction of
54 any evidence the defendant, City of Harrisonville, made the following objection and motion which was adopted by the defendant, Missouri Pacific Railroad Company, "Mr. Barnett (counsel for City of Harrisonville): For the benefit of the record, if the court please, let me, prior to the examination of Mr. Dickey, who I understand will be the plaintiff's first witness, object to the introduction of any evidence under the petition in this case and move the dismissal of the case for the reason that the petition discloses that the case is not a proper one in equity but one for damages, assuming that the plaintiff has suffered any injuries of any character." This objection was by the court overruled and this motion to dismiss denied, to which the defendants then and there duly excepted and still except.

Plaintiff's Case

Thereupon the plaintiff offered evidence as follows:

WALTER S. DICKEY, witness:

Mr. Dickey testified that he is the president of the plaintiff and that the plaintiff is the owner of a farm located near Harrisonville, Missouri, described in the petition; that the

entire farm is something over 300 acres and divided by the right-of-way of the Missouri Pacific Railroad into about equal parts; that plaintiff's exhibit 1 is a correct plat of the farm and the location of the railroad right-of-way, the farm property being shown within the enclosure of the red line on said plat and lying just a few hundred feet outside the city limits of Harrisonville; that the sewage disposal plant, known as the Imhoff tank, maintained by the City of Harrisonville, of which plaintiff complained, is located at the point marked "A" on said plat, a little square adjoining the east side of the railroad right-of-way of the Missouri Pacific.

That immediately west of this disposal plant lies the Missouri Pacific Railroad right-of-way and immediately west of that 100 foot right-of-way lies a part of plaintiff's land marked on the plat, "Kunze 18 "A" and F. Deacon 14.17 A, and through a part of which is shown a meandering line
55 representing Town Creek; that the outflow from the disposal plant called "Imhoff Tank" flows west by a conduit under the hundred foot right-of-way of the Missouri Pacific Railroad Company to a point two or three feet inside the property line of the plaintiff where it discharges into Town Creek at a point marked "B" within the red lines; that this Town Creek is a small affair, except when fed by some springs and rainfall; that it enters plaintiff's property slightly north of this point of discharge, the point of discharge being marked "B" on the plat and the point of entering of the creek into plaintiff's property being marked "B 1"; that the creek from the point "B 1" flows in a southerly direction until at the point marked "C" on the plat it joins with another stream called "Muddy Creek", continuing its flow therefrom in a westerly direction under the name "Muddy Creek".

Mr. Dickey testified that the land lying west of the railroad track is approximately 150 acres, a bottom blue grass wooded pasture with a stream meandering through it, the land being partially rolling; that the land is used as pasture land, about 90 to 100 head of live stock being pastured there at the present time; that he has examined the creek recently and at many times during the last three or four years and is thoroughly familiar with it; that on plaintiff's land it flows between the Missouri Pacific Railroad's right-of-way and the bluff a few hundred feet west of it; that the Missouri Pacific Railroad's right-of-way runs down through the valley and that the land along the creek is rich, alluvial, black soil and that at times there is a good deal of water that comes down from the creek

when there are freshets or heavy rains; that as a rule it is quite a small stream divided up into pools of water, not a continuous rapidly flowing stream, but ample to supply cattle for watering purposes; that up to the point where
56 the effluent from the disposal plant flows into the stream it is comparatively clear, that one can see the bottom of it and that the banks are free of any nuisance or discoloration and that below the point of discharge from the tank into the stream its appearance changes;

"Q. Now, describe the appearance of the creek below the sewer outlet.

A. Well, this small so-called Town Creek below where the sewage enters it from the City of Harrisonville is in a frightful condition now, and has been getting worse and worse for several years. The banks of that creek range from six to eight or ten feet high with shade trees along it in many cases; in many cases roots are sticking out into the bank and as the water that flows down that stream rises and falls with a heavy rain or with a stormy season or the season of the year when the ground is full of water, the sewage coming out of that tank is deposited on the sides of the bank on both sides, and is plainly noticeable to the naked eye, and it is noticeable otherwise because of the terrific odors from it.

Q. What is the color of the water in the creek?

A. Well, in contra-distinction to the color above the intake from the tank, the upper part of it being quite clear and free of any serious obnoxious character, from where the tank flows into it, it is the very opposite, highly discolored, dark, sometimes greenish dark, and in the pools where water gathers and isn't flushed out by rainstorms or in dry seasons, it is particularly black and offensive. It gives off very strong odors, and there is evidence on both sides of the creek of its pollution with human filth.

Q. Now, you say you have made frequent examinations. What is the condition in that creek after a heavy rain?

A. Well, this little valley that the creek flows through and the creek bed is naturally washed and cleansed when we have a heavy rain storm such as we had last Saturday night for eight or ten hours, and after such a storm or after a week's rain in the spring, the creek is more or less cleaned out and washed out, and it looks different and it looks better, and there is not such a terrific odor from it, but those are only on occasions. A great part of the time it is very, very offensive."

57 After a heavy storm the creek is more or less cleaned out and washed out and looks different and there is not so much odor from it, but that a great part of the time it is very offensive; that even a heavy rain will not wash out the banks of the creek entirely; that this condition exists for a couple of miles down the stream, which is a rough estimate of the distance it runs by all of its meanderings upon the plaintiff's land.

Mr. Dicked further testified that there is another creek described as Muddy Creek, which flows through a part of plaintiff's land on the east side of the Missouri Pacific right-of-way, and flows under that right-of-way into the plaintiff's land on the west side of the right-of-way and flows to a point where it joins Town Creek and then flows on west therefrom; that Muddy Creek is the main stream and that Town Creek, which receives the sewage discharge, is a much smaller affair; that Muddy Creek is a clear, reasonably fresh stream with some constant flow; that Muddy Creek below the point marked "C" where it receives the waters of Town Creek is if anything worse than Town Creek, because the stream is larger, the banks higher, and with the rise and fall of water in storm times the sewage settles on the sides of the bank; that the plaintiff's land east of the railroad right-of-way is of the same character; that it is Harrisonville's old time fair grounds and all grazing land in blue glass; that all of the land west of the Missouri Pacific Railroad and all of the bottom land around there skirting the bluff is pasture land all down the creek; that it is a pasture farm suitable for the purposes for which it has been used.

He further testified that the condition of pollution in the creek has existed about six years, getting worse all the time; that when the condition was first noticed the cattle didn't want to drink the water, "we appealed" to the city officials, mayor, clerk, engineer, and made numerous visits down there with them, visited them a half a dozen times and telephoned them; we didn't seem to be getting anywhere by that method so we undertook to have a conference with some of the business men, but the city did nothing with reference to correcting the condition.

58 He further testified that he is the owner of the herd of cattle on the farm and that as an individual he rents the farm from the plaintiff.

"Q. What is the approximate value of the herd of cattle on the farm?

"Mr. Barnett (representing defendant, City of Harrisonville): Just a minute, if the court please. I object to that as not a proper measure of damages in this case. If there is any damage at all it is to be ascertained, as I understand it, under one of two measures. If the damage is to be ascertained as damage for a temporary nuisance, then of course it is the decrease in the reasonable rental value of the property, so much of the property as is affected by this stream, not necessarily the whole tract. On the other hand, if the damage is to be ascertained as for a permanent nuisance, then of course it is the decrease in the market value of the land, that is, again, through such of the land as is affected by this creek, and the value of the cattle on the land is not a measure of the plaintiff's damages in any respect, assuming that the plaintiff has suffered some damage.

"The Court: Of course we have an inference to assume, what the values will be, of course the value of the cattle would not influence the situation save only to determine whether or not it has an effect upon the rental value of the property. If you can determine that and know what cattle were kept there—the objection will be overruled".

(To this ruling and action of the court the defendant, City of Harrisonville, at the time duly excepted and still excepts.)

He testified that a fair estimate would be that the registered Hereford cattle on the land at that time were worth about $20,000.; that they were all registered cattle with the exception of five Holstein nurse cows; that this is a beautiful tract of very rich, blue glass land on the outskirts of the county seat of the City of Harrisonville, and prior to the pollution was amply watered which was its chief attraction of the farm; that the state highway skirts several hundred feet of it; that it is of easy access by rail, three railroads and the highway; that the land affected is the land west of, but not the land east of, the railroad right-of-way, except at times for the odors that sweep over there; that the land on the east is equipped with suitable barns, a silo and
59 water supply to the barns and elsewhere and is rigged up for the purpose of raising registered live stock or selling for breeding purposes; that the pipes of water supply used in the barn are all on the east side of the tract; that also on the east side there has been built a large, glazed, hollow tile barn, fitted with metal furnishings and partitions, feed boxes and feed room, silo which we fill every year, and equipped with water mains and pipes for water and that the entire place is fenced and cross fenced.

"Q. At what expense have these improvements been made?

"Mr. Barnett (Representing defendant City of Harrisonville): I object again. I do not think this is any proper measure of damages. I object to the whole line of this testimony. I do not want to unduly interrupt the witness and counsel, but I want to save the point and be understood by the court as objecting to this whole line of testimony about the various improvements and things of that kind on
60 the property, and insist again that the measure of damages is such as I stated in my last objection (the one last herein set forth).

The Court: "The objection will be overruled at this time".

(To this ruling and action of the court, the defendant, City of Harrisonville, duly excepted and still excepts).

Mr. Dickey continuing testified that the cost of the improvements on the farm run $25,000 or $30,000 in the barns, silo and the water supply of the ponds that have been created for water and the pumps in connection with them, fencing, things of that kind; that the land affected by the polluted stream is about 110 or 120 acres, because the stream runs through about that much, and that when the balance of the land is damaged from the recurring odors, especially in summer when the streams are low; that this odor is pronounced and can be smelled for half a mile at times when the wind is in the right direction.

Mr. Dickey testified he had been buying and selling real estate to some extent in and around Jackson County for a number of years and that he owned farms other than the farm in question; that he had cultivated these farms and raised Hereford cattle and nurse cows for them, no other kind of cattle; that he would not think he would be any expert on the rental value at Harrisonville, but that he had an idea about it; that he was not engaged in that business down in that particular county but that he thought he knew something about it; that he paid rent at the present time to the plaintiff for the land in question of about $3.17 per acre per annum; that is for the 120 acres affected by the creek.

Q. "If the water supply in that 120 acres were unpolluted what would be a fair rental value per acre for that 120 acres?"

"Mr. Barnett (representing defendant, City of Harrisonville): I object to that question for the reason, first, that the

witness is not shown to be competent to give expert testimony on that subject in this location; the witness' experience in the County of Jackson, even if that tended to qualify him as an expert in the County of Jackson wouldn't obtain with reference to the lands and rental values in Cass County, for the reason, which is well known and of which doubtless the court takes judicial notice, that Jackson County is
61 crossed and recrossed with a system of many rock highways and has a much greater density of population, and that the witness is not shown to be qualified to give expert testimony on the subject of rental values in Cass County, Missouri, which is purely a rural community."

Mr. Dickey testified further that he acquired this farm at Harrisonville about 17 years ago and had been in direct control and ownership of the farm since that time; that Cass County adjoins Jackson County; that he had made frequent trips to his farms including that at Harrisonville; that he is reasonably familiar with Cass County and has been for forty-five years; that he has given attention and study to the use of the farm in question to make it pay its board; that he thinks he is acquainted with the fair rental value of that 120 acres; that he spent about 15 or 16 years acquiring the farm in question, had a man living down there for a year and a half trying to get it; that in that connection he investigated Cass County land in that vicinity and knew generally about it; that he occupied the land in question prior to the construction of the sewer plant of the city; that the condition of the stream prior to the erection of the plant was all right for the purpose of pasturing cattle in the land; that the cattle drank this water at that time and that there were no odors or discolorations or deposits on the banks of the stream.

Q. Then state what the rental value of the 120 acres lying west of the railroad right-of-way would be if this stream had its natural flow and if the sewage plant of the City of Harrisonville did not discharge into this stream.

"Mr. Barnett (representing defendant, City of Harrisonville) I object to that question for the reasons heretofore stated and for the further reason that it assumes pure and undefiled water and a state of facts in conflict with the admissions already made under the evidence and pleadings of the plaintiff to the effect that this stream is in a low place adjacent to this community and naturally would receive the drainage and waste from the community, and would, under no circumstances, regardless of the construction of this

plant, be a pure and unpolluted stream; that the ques-
62 tion is asking of the witness a great many assumptions from him as an expert, not only as an expert in real estate values but asking conclusions from him with reference to the effect of the discharge of this sewer system and the effect of the drainage of the district into the creek without a sewer system; that it is a complete invasion of the province of the court to pass upon those matters of fact.

"The court: The objection will be overruled."

(To the ruling and action of the court the City of Harrisonville duly excepted and still excepts.)

Mr. Dickey continuing testified the land would be worth two and one-half or three times as much per acre with water such as we had before this Imhoff tank was installed; $7.00 or $7.50 per acre per annum for that purpose; that plaintiff has been receiving $3.17 an acre for the land for just five years now within a few days; that plaintiff was incorporated in July, 1925, in the State of Delaware.

Cross-Examination

Mr. Dickey further testified that he commenced to buy this land in 1913 and that the entire tract was assembled by him in 1914, ninety per cent of it bought prior to early 1914; that it was bought in the name of another individual but belonged to him personally; the land standing in the name of Griffin, his purchasing agent, up until later when it was deeded to Mr. Dickey personally and he deeded it to the plaintiff, organized in 1925; that he is the president of the plaintiff and its chief stockholder and owns a majority of the stock of the plaintiff; that the disposal plant was first put in operation in the spring of 1923; that some time after the work was completed and the sewage of the city was turned into the main pipes going down to the Imhoff tank he first noticed the conditions now complained of; that some months after the plant was put in operation he complained to the officials by letter and can produce the written answers; that the conditions complained of were discovered some time late in 1923; that this property was deeded to the
plaintiff as a part of its original capitalization along
63 with other property in 1925; that at that time he was, and for a long time had been, a resident of the State of Missouri.

He testified that the City of Harrisonville stands on a rather high point of ground with reference to the surrounding country and that the land slopes away practically in all

directions from the town square, which is roughly speaking in the center of population of the town; that all of his land in question has access to Muddy Creek before it joins with Town Creek at the point marked "C" on the plat; that the land on the east side of the track where the improvements are has easy access to the land on the west side of the track by a passageway and locked gates and a first class opening across the Missouri Pacific right-of-way, which is used freely; that nearly 100 head of cattle are running on the west side of the track most of the time because that is the best grazing land; that this 100 head of cattle and 7 or 8 horses represents the entire stock on the farm and that it has never been used for any other purpose; that they graze the cattle over on the west side but can't water them and the cattle don't water themselves in the creek; that for the benefit of the cattle on the west side plaintiff has created a small water supply for them from a little spring; that the cattle also go to Muddy Creek for their water; that they won't drink the water out of Town Creek because of the sewage; that they eat the grass, however, all over the tract.

The right hand edge of this plat "Exhibit 1" represents the north and the creek in question may extend further north and east than the beginning of it shown on this plat. The land of Judge Bruce joining on the west is cultivated land. I can't give you the rental value of any Cass County land. Prior to the erection of the disposal plant we had no trouble with the water. It was fine. During that time I never heard of any objection to the water.

Witness, Leslie A. Bruce

Leslie A. Bruce (Judge of the Circuit Court of Cass County and Johnson County, Missouri), called as a witness on behalf of the plaintiff testified upon direct examination as follows:

64 I reside at Pleasant Hill, Missouri, but own a farm on the outskirts of Harrisonville, about 197 acres that I acquired in April, 1923, and designated on plat "Exhibit 1" as A. R. Elder tract and also as lot No. 3, the entire tract bordering the Dickey land for about three-quarters of a mile. Town Creek flows through a part of my land entering it at a point marked "1" in lot 2, leaving it at a point marked "2" and re-entering it again at a point marked "3". Since the fall of 1923 the water in that creek has an odor to it, sometimes more noticeable than others. It is always discolored, a dark color between green and black. There are

deposits on the banks of the stream. The sewage was turned into this stream in the fall of 1923 just a few months after I acquired this land. The conditions referred to have existed constantly since the fall of 1923. Cattle on my farm, about an 80 acre pasture there, have access to this stream and have to cross over it to reach the southern portion of the pasture on my farm. It is my opinion, based upon several years' observation, that it affects the hair on the cattle where this water comes in contact with their legs. For a while I occupied the farm, that is owned the cattle and ran them there myself. The water, I think, injured the appearance of my cattle, giving the hair a dead color, not slick, don't carry any sign of oil that cattle usually carry when doing well and I attribute it to wading across the stream. I now rent the farm. The cattle drink the water at times. My tenants tell me that they are drinking the water. The tenants have a well that they use for their milk cows but some of the stock cattle drink that water. There is only one time I can say that the cattle would not drink it. That was in the winter of 1925. The creek froze over solid. The water came down on top of the ice as far as my land. The tenants undertook to cut the ice for the cattle to drink the water, and they would not drink it. The water flowing down on top of the ice at that time had a noticeable yellow color.

At the present time I receive $4.00 cash rent an acre for my entire tract. I have received as much as $5.00 an acre. I am familiar with plaintiff's land lying west of the railroad right-of-way. It is different in character from my land most of it. It is what we term first bottom land among farmers. That is it adjoins the creek and is a richer soil than
65 mine. It produces more grass, good pasture land. It is partily wooded and the underbrush cleared out, a timber pasture possibly some brush. I never knew of the land to be used for anything but pasture purposes. All my life I have lived between Harrisonville and Pleasant Hill, a distance of five or six miles of Harrisonville and own two farms in the county. I think I am acquainted with rental values of land in the county and the vicinity of Harrisonville. I have observed Town Creek above the sewer outlet. I cross it going to the farm. At the present time it is in good condition. A few years ago, prior to the erection of this sewer system there was some sewage emptied into this stream north of the present disposal plant, the court house had a private sewer and I think maybe it connected with the city jail. The two had a private sewer that emptied into the stream about three-quarters of a mile north of this present disposal plant. There was then some pollution in that water, although I re-

member no distinguishable odor. I never noticed any color to the water at that time prior to 1923 or the deposit of any solids.

I judge that reasonable rental for the plaintiff's land in the condition of the stream prior to the construction of the sewer plant would be $6.00 an acre. I think it would have had at least that rental value, assuming good water, any time within the last five years, although farm rentals are just a little cheaper now than they have been.

On the largest portion of my land we raise grain, a part of it is pasture for grazing purposes. It is suitable for a dairy farm and partially used for that now. The creek affects the suitability of my land for dairy farming.

On my farm I usually don't notice any odor until I get within a 100 feet or 100 yards of the creek. I never noticed it up at the dwelling, approximately one-half mile away. I have noticed it passing along the road to my farm just north of Mr. Dickey's land, a distance of not quite a quarter of a mile and have noticed it when the wind was in the south that far. The corn land part of my farm runs right down to the creek and it is necessary for my tenants to go there and farm that land. My farm is, I think, just a quarter of a
66 mile from the west limits of Harrisonville. My residence, at which I do not notice the odors, is at a point marked "X" at the north end of the land marked A. R. Elder, but I have noticed the odor in driving along this
67 road, the road crossing the railroad tracks at the point marked "Y", when the wind was in the south. I did not rely entirely upon this creek for the water supply on my farm. I dug a well especially to water my stock, that is the milk cows, although my stock do water out of the pasture. I am informed they come to this well for water. I don't personally know about that. I dug the well only two years ago and haven't occupied the farm since then.

Cross-Examination

I have rented my land for the last two years at $4.00 an acre, although previously I received more. The sewer from the court house that formerly discharged into the creek carried the sewage directly into the creek by a 4 inch tile without any filtration whatever. The corner of the cemetery lies within 25 or 30 feet of the creek. I don't remember whether the creek runs through the cemetery. I only remember that at the entrance of the cemetery it is just a short distance away. I know of Mr. Smith having a slaughter house west of the Kansas City, Clinton and [Bulf] Railroad on

this creek right back of what we call Gulf Pond. This creek at the present time runs clear across the Gulf Railroad and runs up North under the Frisco Railroad and up to what is at the present time the city dam or reservoir and passes through what we call Gulf Pond or at least close by. There is an ice plant along there and just north of the ice plant is the Gulf Pond. The slaughter pen is right on the side of the pond. Possibly the west fence is on the edge of the pond. No, I have never been in the water of the creek above the cemetery, and I haven't seen anybody in it, but I know the water above is not what it is below. I have seen cattle in there on the property below the cemetery but above the sewer outlet. I can't tell anything about the pollution of the stream above the cemetery. The county sewer did discharge into the creek above the cemetery.

I know of a milk plant on Independence Street in the city of Harrisonville. I don't know where it discharges its surplus water. Yes, the cattle eat the grass along this
68 stream and my cattle have been drinking the water. It has been two or three years since I was last down along this creek on the Dickey land. The 18 acres at the extreme north end of the Dickey land is cut off from the remainder thereof by a public highway crossing the railroad tracks at the point marked "Y". All the Dickey land east of the Missouri Pacific has outlet on road separate from the state highway and separate from the tract into which the sewer plant discharges, also the south part of the Dickey land is on a highway.

All of the small streams down there are full of brush and decomposed leaves. The deposit on the bank of the stream of which I spoke was a black substance but what it was I can't tell you. It had some animal fat in it and had a greasy appearance and is on the bank 6 inches to a foot above the water line. Yes, sir, decomposed leaves will leave a black, slimy coating on a cow's limbs. Yes, sir, it is required in dairy enterprises that regardless of stream contamination the udders of the cows be washed. I have noticed this deposit on the creek bank every time I have been to it. I have not been up Muddy Creek recently. I crossed Muddy Creek within the last three years. I didn't notice anything unusual about it. This deposit on the creek bank is an unusual substance. I never noticed it along any other creek. It is a black deposit and offensive. I took a stick and picked it up on the stick and tried to analyze it. It is most offensive in time of low water and is of a skummy nature. I have seen it dried on the stocks' legs and it has an odor at that

time. I have visited the disposal plant twice. I was a member of the Golf Club at one time. The odor from this tank was never offensive except at No. 1 and that was within I suppose 200 feet of the tank itself. I have noticed it on the greens. I never did notice it any further away than No. 7 green. No. 1 green is about 200 feet from the tank and No. 7 green would be 400 or 500 feet.

E. B. Black, Engineer being called as a witness on behalf of the plaintiff testified as follows:

Direct Examination

I graduated in the Engineering school of the University of Kansas in 1906 with a degree of B. S. in Engineering and received the degree of Civil Engineer from the same institution in 1924. I am a member of various engineering societies, having had several years practice in land and ir-
69 rigation survey work and served as assistant masonry inspector on bridge construction on railroads and have been employed as a consulting engineer. In 1910 formed a partnership in Kansas City under the firm name of Worley and Black, which continued until 1914 when Mr. Worley retired, and in 1915 formed a firm connection of Black and Veach. In June 1917 was a civilian construction engineer for the War Department in charge of water sewerage, electric light and power construction at Camp Pike, Arkansas. Later commissioned in the army and attached to the finance division of the Signal Corps and assigned to the War Credits Board having in charge investigation of applications for advances to contractors for war supplies. In August 1918 served as an engineer in charge of construction work in the United States and returned to private practice in December, 1918, in the firm of Black and Veach. Our firm maintains a normal force of fifty or sixty engineers for water and sewage work and specializes in sanitary engineer work. Our practice covers the design of 86 sewage disposal works in 12 states and Hawaii. In Missouri we have had experience in sewage work in some 25 or 30 cities.

I have made some 10 inspections of the Imhoff tank and Town Creek at Harrisonville, beginning on August 11, 1928 and continuing to June 9, 1930. I inspected the creek above the sewer outlet as far as the point where it crosses the Missouri Pacific tracks north of the sewage plant. I refer to a point on Exhibit 1 marked "B 1". I found this water clear, soft stream bed lacking in any deposit indicating the presence of sewage. I took samples of the water and have them

here, to-wit: plaintiff's Exhibit 3 bearing the mark "No. 1". This was collected on November 6, 1928 from a point twenty feet above the sewer outlet. Plaintiff's Exhibit 4, bearing the mark "No. 2" is a sample collected approximately twenty feet above the sewer outlet on August 11, 1929. I also took samples below the sewer outlet, plaintiff's Exhibit 5 marked "1-a", taken November 6, 1928 fifty feet below the outlet, also plaintiff's Exhibit 6, marked "1 B" collected about 150 feet below the outlet on November 6, 1928, also plaintiff's Exhibit 7, marked "1 C" collected by me on November 6, 1928 about 1000 feet below the outlet. All those samples have been in my possession continuously since they were taken. I have never found Town Creek below the sewer outlet
70 other than in a grossly polluted condition. I mean a condition where the water in the creek beginning with the sewer outlet for a distance of twelve to fifteen hundred feet has contained black deposits or the dark gray deposits characteristic of sewage pollution and a number of pools actively septic, that is undergoing putrefaction processes. This I determined by the odor and the active appearance of gas upon the surface of the creek, that is gas bubbles coming to the surface. Above the water line there appeared deposits left by rains which have washed the deposits upon the bank. These deposits are quite noticeable. This creek is a succession of pools and riffles and the water level, excepting at times of rain, remains almost normal, that is at the same elevation. These gas bubbles have always been apparent immediately in the sewer outlet and below it and I have observed them for the full length of my inspection about 1500 feet below the outlet. I notice the odor typical of sewage, that of sulpher and of hydrogen. Whether or not the odor is noticeable depends on atmospheric conditions as well as conditions of sewage. It depends partly on the wind. We have determined the biochemical oxygen demand of this stream above the outlet from samples collected on May 25, 1930 and June 9, 1930. We found that a sample collected approximately 100 feet above the outlet on May 25, 1930 contained 4.4 parts per million of dissolved oxygen. Also in another test on the same samples at the end of five days it still contained 2.5 parts per million of dissolved oxygen. Also we made a test on a sample collected at the same point on June 9, 1930. This sample showed a dissolved oxygen content of 6.4 parts per million and five days later 4.4 parts per million. A stream containing 4.4% dissolved oxygen has not been grossly polluted by sewage. It will sustain fish life. 4 parts per million being used as the minimum to sustain fish life. Such water is fit for the consumption of cattle. We also

took tests below the outlet, one a sample collected on May 25, 1930, sixty feet below when we found its biochemical oxygen demand was 35 parts per million and a sample collected the same day some 1200 feet below showed such a demand of 80. On June 9, 1930, again a sample collected 60 feet below showed a biochemical oxygen demand of 100 parts and a sample taken some 1200 feet below showed a demand of 75 parts per million. The sample collected some
71 1200 feet below on May 25th was examined for dissolved oxygen and found to contain none. Such water could not sustain fish life. It indicates or is proof positive of organic pollution. In the case of Town Creek there is but one conclusion and that is that the pollution is from sewage.

The volume of Town Creek would have to be increased from forty to fifty times its present volume in order to take the present sewage flow and still leave in that water a sufficient amount of dissolved oxygen or two parts per million below which dissolved oxygen content we may expect and most certainly get odors. The biochemical oxygen demand test is the only one from which such calculations can reasonably be made. If there is a sufficient volume of water it may take a given quantity of sewage without pollution but there is not any such quantity in Town Creek as to take without pollution the discharge from the Imhoff tank. It would require a volume of water forty or fifty times larger.

It is possible to treat the sewage of Harrisonville so that it may be discharged into a creek of this size without pollution. There are a number of such treatments. All sewage treatment is purification or oxidation, whether by dilution, by being discharged into a stream, or by the treatment under controlled conditions that work as a matter of oxidation.

"Mr. Barnett: (interrupting) Just a moment. Let me interrupt a minute. I assume that it is not necessary for me to make these objections along in order to preserve our theory of law as applicable to this case and what is not proper evidence here. We object, of course, to any line of testimony tending to invade the right of the city and its legislative representatives to determine upon the type of sewage plant that shall be used. That is a matter within the power of the city to say, and of course, if having said so, the type of disposal plant adopted inflicts any damages, which of course we deny, then that is a matter of recovery on the part of the person in-

jured, but we do object and we have in the beginning of this case objected and we continue to object throughout. To save time I shall not repeat the objection to any effort on the part of the plaintiff in this case to introduce evidence here tending to show that possibly some other type of disposal plant or some supplementary disposal plant or some other
72 method of treating this sewage would be less likely to cause pollution. We insist that that is a matter within the province and discretion of the city and its representatives.

"The Court: Objection overruled. You may proceed".

73 (To this ruling and action of the court the defendant, City of Harrisonville, at the time duly excepted and still excepts.)

The witness continued:

The methods ordinarily employed to so reduce sewage that the ultimate outflow will not pollute a stream are to use, first, an Imhoff tank, which serves for preliminary treatment. Supplementary to this there are used what is ordinarily known as sand filters, trickling filters or activated sludge. Those are the three types. In Harrisonville there is used only the preliminary treatment of the Imhoff tank. Such a treatment cannot dispose of sewage so that the outflow will not be septic. By preliminary I mean the extent to which the treatment of a tank of this type goes. The final purification is either carried on by the body of water into which the sewage is discharged or by a secondary refining plant or not at all. It is not possible to operate the Imhoff tank of the City of Harrisonville so that its outflow will not pollute Town Creek. Plaintiff's Exhibit 8 is a photograph of this Imhoff tank and a part of the sludge dry bed below that tank taken by me on August 11th, as are also Exhibits 9 to 14 inclusive all taken on August 11, 1928. The Imhoff tank is built for the purpose of settling out the solids which will settle out from the sewage in a comparatively limited time, say in an hour or two hours, and the immediate passing on out of the tank of the liquid from which those solids have settled. This particular type of tank is divided into two stories, the upper stories or settling compartments and the bottom compartment or a sludge compartment. Solids have settled from this fresh sewage fall down along the sloping concrete floors and thence through a slot or opening in the bottom of each settling compartment into what is known as the sludge digestion chamber in the bottom of the tank, in which the fermentation and putre-

faction of the solids takes place. The gas arising from such changes within the settled sewer or the sludge is sealed from the settling compartment of this tank, or settling compartments. There are two in this case—by the nature of the construction of this vent through which the sewage falls. The gas presumably collects to one opening which is the gas vent or the gas opening shown in these pictures as the central compartment or opening at the top from one end of the tank to the other. The results of Imhoff treatment depend a great deal on the sewage and the sufficiency of design of the
74 tank and its proper or improper operation. In case of a sufficient design and proper operation the maximum result that may be expected from an Imhoff tank would be a 55 or 60% reduction in putrescible matter.

I have examined this particular tank and find that on present day requirements it is probably capable of taking care of a population of 1,000 in the matter of its sludge digestion chambers. From 1200 to 1500 people were probably connected to this sewer in the fall of 1928. I also found that in the case of this particular Imhoff tank raw sewage was passed directly from the outfall of the sewer to the stream without going through the tank. That was either some defect in design or operation, and that from the odors of hydrogen sulphide, at times, that there was septic action in the settling compartments of the tank coming up through the settling compartments and during the first visit I made to the plant the neglect of it was very apparent. Exhibits 8 to 14, show grasses, weeds and tomato plants growing in the sludge bed and in the sludge in the gas vent compartment of the tank. Such a condition does not exist in a well operated plant. Later I noticed a material improvement. The weeds had been fairly well cut down, the tank cleaned up and no weeds were growing in the sludge in the gas vent or in the sludge bed. At the same time I examined the creek. There was no difference in it from my earlier observation. The improvement in operation did not affect the final maximum reduction of putrescible matter that you can get through such a plant. This plant is constructed so that raw sewage may be passed directly around the plant into the creek.

Of course, the best designed system can fall down unless properly operated. Effluent from any of the plants that I have mentioned, that is activated sludges, sand filters and trickling filters, could be such that it could be discharged into Town Creek without the creation of a nuisance or any condition unfitting the creek for stock water. The outflow from

the plant would be relatively clean and without offensive odors. This activated sludge plant or sand filters, or trickling filters is what is known as a secondary, or final type of plant and this present Imhoff tank with some changes in the system of baffling can be used in connection with such a secondary plant. The cost of adding such a secondary system would be $25,000 to $30,000.

I am familiar with plants in towns about the size of Harrisonville. The following are some of the towns that have bought the primary and secondary plants, and the populations given are according to the 1920 census reports. These towns in Missouri are, Hamilton 1689, Odessa 1786, Fayette 2381, Plattsburg 1719, Ridgeway 8012, Humanville 1765. Higginsville 2724, Cameron 3284, Macon 3549, Farmington 2000. There may be others. Of these towns the plants designed by my firm are at Cameron, Farmington and Plattsburg. It would take the City of Harrisonville from two to four months to construct such a plant.

The last examination I made of Town Creek was on June 9, 1930 and I found then deposits like those in plaintiff's Exhibit 5. The black deposit in the bottom of the jar, plaintiff's Exhibit 5, I also found in the creek on June 9th in sufficient quantities that any particular agitation of the water in the pools would stir it up and make the water black. In the 10 examinations I have made of this creek I have found the conditions substantially the same.

Cross-Examination

The first knowledge I have of this stream is from an examination I made August 11, 1928, when the sewage disposal plant was in operation and the comparison which I made then and on subsequent occasions were comparisons between the character of the stream above the sewer outlet and below it. I know nothing of the character of the stream before the erection of the Imholff tank. It is an advantage to treat sewage through an Imhoff tank rather than running the raw sewage into the stream even without secondary treatment. Of course there would still remain at least 40% of putrescible matter in the effluent dumped into the creek without secondary treatment. That is a thing which is inherent in the character of this tank and this treatment even when properly operated. That was true from the very day that the tank was first built and put in operation. Nothing more could have been expected of it.

The water of this creek above the outlet, as well as below, is in my judgment unfit for human consumption. The city of Harrisonville is located on an eminence. This creek
76 may wind around the city even on the east side and then the north side long before it gets to the Dickey property, but I haven't followed it around on the north side or the east side. The location we are considering now, the Dickey property, is on the west side of town. I know nothing about what sources of contamination may be from my own observation up stream from the place where the creek flows under the Missouri Pacific tracks only the plaintiff's land.

I do not mean to say that raw sewage continuously flows into the creek without treatment in the Imhoff tank, but merely that I have seen it go directly to the creek and not go through the tank. That was on August 11, 1928, and again on August 19, 1928. I don't know that I have ever seen that since, although I have made some ten examinations. The sewer system of Harrisonville consists of a collecting system in the city and a line of tile leading from the city in one final main to a point a short distance before it reaches the Imhoff tank where it reaches a receptive chamber which has a manhole. There are two conduits leading from this reception chamber, one leading to the Imhoff tank and the other leading around the side of the Imhoff tank. In proper operation this latter conduit is kept closed so that the sewage flows through the bank. This might be an emergency feature but it was not being operated as such when I saw it. It is not good construction and is expressly eliminated by some State Boards of Health. Of course it would be impossible to make any repairs to a compartment of a tank such as this without either stopping the sewage flow somewhere in this collection system or bypassing it. It is bad construction because there is no particular reason for such a bypass which can be operated at will and may therefor create a nuisance by passing raw sewage around the tank straight into the stream.

I had no connection with this matter in 1923 and I know nothing about whether clay from the newly constructed sewer plant was washed down the tiles in sufficient quantities to stop the sludge exit and make it necessary to bail out the entire plant and I know nothing about using this bypass at that time as an emergency matter. The Missouri State Board of Health is not among those condemning this system of bypassing.

77 I took samples on every visit to Harrisonville and took them in this manner. I wore rubber boots so I could get down into the stream. The samples above the sewer outlet have been taken either in the running water or in the pool at a point where I could easily reach it. The bottles had been washed out prior to taking the samples, and the samples collected without touching the bottle neck with the hands and corked and marked and immediately brought back to my office. There are no twigs or leaves in the samples taken above the outlet, although I could have put twigs or leaves in those also. There was plenty of such vegetation above the outlet. It is true that I placed these twigs and this vegetation in the samples taken below the outlet to collect hereon the impurities to indicate the presence of sewage and that I might have had such twigs or vegetation in the samples taken above, but I didn't because there wasn't any sewage above to attach to the twigs. The samples I took below the outlet I took where I got a quantity of vegetation along with them and those I took above without getting any vegetation in them. Exhibit A I took near the bank because it is a considerable pool, the depth is uncertain—I stirred up the stream, stirred up the accumulations in the bottom of that pool in taking that sample in order to get a fair cross section of what deposit might be on the surface, I mean on the bottom, the same thing is true of Exhibit 6. As I recall Exhibit 7 I had to stand on a fallen log across the stream, the water was flowing rather swiftly. Exhibit 3 was taken near the edge of the creek. It was quite muddy at that point and there was only a slight flow of water. And then I had to get out into the mud and take this sample in water that I should judge was less than 6 inches deep at the point where I took it. I didn't stir the bottom of the stream bed, but it was plain ordinary mud, clay without deposits. In taking Exhibits 5 and 6 I stirred up the sediment of the stream but did not do so in taking Exhibits 3 and 4. Yes, sir, there is a considerable amount of vegetation all along the stream and down in it, twigs and leaves, and ordinarily it is a sluggish stream. It is true that sometimes decayed vegetation in a creek will send up gas bubbles. Roughly speaking I have taken 50 or more samples. Later samples were not taken at the identical place where previous samples were taken.

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78 W. G. BRYANT

W. G. Bryant, called as a witness on behalf of the plaintiff testified as follows:

I am local farm manager at Harrisonville for Mr. W. S. Dickey and live in the farm house. It is practically a grazing farm. We have a herd of cattle ranging from 75 to 100. That part of the farm on the west side of the Missouri Pacific is strictly pasture land somewhat rolling and partially wooded with about 120 acres in it. Town Creek runs through the length of the tract, which is L shaped. The condition of the stream below the sewer outlet is very bad, stagnant in pools, black, bubbly in those deep places and often offensive in odor, I live nearly three-quarters of a mile from there and when the wind is in the northwest of a damp morning I can detect the odor at my house. After the cattle wade across this stream they come out with black mud and slime up about their knees and the cows with their udders all matted with that substance. The calves nurse in that pasture. In dry weather the cattle won't stay near this tank at all. The odors are very offensive and they hardly stay up in that part of the pasture. I don't think they drink the water. I never saw them do it. For water they either go above that tank or go way down at the west end.

When some of the cows were getting calves we wanted them out of there because of those conditions. Summer before last three cows slipped their calves and last summer five. The cattle don't seem to do good in that pasture and in the spring of the year they don't shed off until quite late. Some of them haven't shed yet. I don't know what effect it would have on a prospective purchaser to take him over into that pasture. Cattle don't look so good and the odor is disagreeable.

Grand River is about two miles due west. Before this sewer connection was made the water in the creek was good water to supply cattle. They drank it and there was no odor to the creek. The water was clear except after a rain.

This land never has been used to my knowledge for anything except pasturage.

79 Cross-Examination

The cattle now drink water above the sewer outlet and they drink the water in Muddy Creek above the point where Town Creek empties into it. I never saw them drink the water between the sewer outlet and the point where it finally leaves our land. They won't hardly stay up in the north end of the pasture. You hardly ever find the cattle in the neighborhood of the sewer outlet. Yes, sir, these cattle are

registered cattle. Whether a cow will slip a calf even though she has the purest of water is something I know nothing about. I don't know why a cow slips a calf.

LAWRENCE L. VAN HORN

Lawrence L. Van Horn called as a witness on behalf of the plaintiff testified as follows:

Direct Examination

I farm near Harrisonville on the place adjoining the farm on the south and have lived in the vicinity of Harrisonville sixteen years. I am familiar with the plaintiff's land west of the Missouri Pacific right-of-way and with Town Creek and used to own part of that pasture land before I sold it to Mr. Dickey. I have observed the waters of that creek recently. I am around there every few days. Our house is a quarter of a mile away. This spring when it was dry that was a mighty nasty creek. You don't notice the color of the water so much until you rile it up. You can rile it up from the bottom and it is just like ink and then it has at times a kind of soap sudsy appearance. Wherever there is a little drift or anything this foam collects on the banks. The creek has a mighty bad odor. I am familiar with Muddy Creek and the black water I speak of in Town Creek. We fished for craw dads in Muddy Creek below where Town Creek comes in. The first this year was along in April. We got mighty few crawdads and they were in mighty bad condition. We made two or three drags in different places and there was so much waste in the bottom of the creek and such a vile odor that we left. We went about half a mile back on Muddy Creek from its junction with Town Creek, and seined out all we needed. A half bushel I suppose in two or three drags. Grand River is about three miles from Harrisonville. Before the sewer plant was built this creek used to be as nice a little creek as you would want. The water was fine, the cattle drank it, and lots of fish there at one time. Yes, sir, I have caught
80 fish out of the creek. That was before the disposal tank was constructed. There wasn't any odor there at that time and the water was as clear as any of these creek branches in the county. That is, just ordinary creek water.

Cross-Examination

There are a lot of logs and brush in the creek. There are a lot of dead leaves, decomposed leaves in the creek. That you will find more or less in any creek, and when you step down

into those old leaves gas bubbles will come up. That is true of this creek too. There is no rock bottom in this creek that I know of. We kept cattle in it when we owned it. I knew of the incident before the disposal plant was built when the stock along the creek became sick and a good many of them died. I haven't paid any attention to whether any of them got sick or died since the sewer was put in, although I knew of Mr. Dickey losing some cattle. (I know that there is a disease in herds of cattle that will cause cows to slip their calves.) I was up in this Dickey pasture only two or three weeks ago. It has good blue grass and it had been eaten off close. I have been all over the tract and there is usually cattle in there. I never paid any particular attention to how close they ate the grass. I have seen the cattle up in the upper part of that pasture. Yes, I know where the slaughter pen is up the stream. In the winter time they butcher quite a bit there and butcher hogs there in the summer time. Yes, sir, I know where the creek runs within some twenty or twenty-five feet of the graves in the cemetery. The stream goes right along the south side of the cemetery. I know that there has been a county sewer in there although I didn't know just where the outlet into this stream was. I knew there were some places on the square there that were served by the sewer.

E. R. Logan

E. R. Logan called as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

I live about a half mile west of Harrisonville on Judge Bruce's farm. This is the fourth year there and I have lived around Harrisonville all my life. My brother and I rent the Bruce farm. The stream that runs through Mr.
81 Dickey's land after leaving his property runs through our farm, coming in and out of our land a time or two. The stream runs through the pasture where we keep our cows. The water has an awful strong odor in dry weather and has a kind of greenish skum on it when the water is low and along the edge of the water a kind of black color. That's the condition of the stream where it crosses our land a half mile or more below the sewer plant.

"Q. Do you have any water supply for the cattle on your land other than this creek?

A. Well, our milk cows, when they come up at night we water them at the barn. We have a well and cistern there.

Q. These cows drink at the barn?

A. On hot days they always go out to the water trough.

Q. How is that?

A. On hot days they always go out to the water trough and drink in the evening when we get them up.

Q. Now, have those cows been in the pasture where this creek is? A. Yes, sir.

Q. And they have had a chance to drink out of the creek?

A. Yes, sir.

Q. And when they come up to the barn, they go to the water trough and drink there?

A. On hot days, yes, sir.

Q. When was that well built there?

A. Well, the well has been there a long time. The cistern has been there about two years. I think". It was built for watering stock. I was away from Harrisonville just before the city's disposal plant was built, but when I was a boy that stream seemed to be all right. Although, of course, in dry seasons the creek would go down and have a few holes in it and wouldn't be so very good. I never noticed any odor there at the time, although there may have been and in dry weather when the water was low there would be in those times a green skum on it, but there was no black in it, that I ever noticed nor any of the deposits on the bank that I speak of. At the present time in a dry spell I can notice an odor 100 yards or maybe 150 yards away from the creek.

Cross-Examination

It is true of any stream down there that when these small streams are filled with logs and brush and leaves there is an odor from them on a real hot, dry day. This is just mud bottom creek, rebuilt soil and I have been in pretty near
82 every pool in the whole creek one time or another. It has always been true that where cattle would come out on the bank in a muddy place they would have the water marks on them, and the gumbo, or leaves. We have 29 head of cattle and seven horses in our pasture. 14 of the cows are milk cows and 15 of the cattle are not and they water at this creek. On hot days the 14 cows who have water up in the barn sometimes come and drink in the evening and sometimes not. At night we keep the cattle up in a little pasture there at the barn. That is where we furnish the water which we pump for them each day, fresh water. I have rented this

pasture and one other pasture besides this several years ago in the neighborhood of Harrisonville and I have heard people discuss what they are getting for pastures around there. That price is around $3.00 an acre, some a little higher and some a little lower. I don't see why the cattle on the Dickey land west of the railroad shouldn't take water and drink from Muddy Creek. No fence or anything to keep them from doing it. I never knew of any sickness along there among our cattle since the sewer system was built or before that.

At this point the witness was interrogated concerning the presence of a slaughter pen on Town Creek and plaintiff's counsel made the following statement.

"Mr. Hazard: If your Honor please, I think we might save time now. I do not know whether there is a cemetery or a slaughter pen or an ice plant and some other things up there, but I take it that for certain legal purposes they want to prove that they are there. Now, they may bring on the city engineer or any other official who says they are there, and that ought to be the end of it."

The witness continuing testified. We have had no sickness in our herd since this sewer system was put in and our cattle have been drinking this creek water.

The farm I rent from Mr. Bruce has a house and barn and sheds, hogshed, tool shed and is cross fenced. There is 197 acres and we pay cash rent, $800.00, practically $4.00 an acre. About ninety acres of the land is cultivated land and the cultivated land is more valuable than pasture land. There are no improvements on the Dickey land west of the railroad except the cross fences for boundary fences. The land we rent is more accessible to the road than the Dickey land west of the railroad.

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83 CHARLES A. DUDLEY

Charles A. Dudley called as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

I live seventeen miles east of Kansas City, and I am in charge of the farms that are owned and operated by Mr. Dickey. I have been going to Harrisonville every two or three weeks since 1919. This pasture west of the railroad is pasture land, wooded with lots of good blue grass in it and

very poor water at the present time. The water is polluted from the sewer system of the City of Harrisonville. It is black and gummy with a lot of human sediment in it, polluted awfully bad. There are odors that you can detect three-quarters of a mile away when the wind is in the right direction. Muddy Creek too is polluted more or less after the big rains have backed the water up along the bank above
84 the junction of the two creeks. The water in Town Creek before the construction of the sewer was all right and the cattle drank it. The color of it was like most any creek, fairly clear in the pools. Last year we had five cows slip their calves and this year three. The cattle in that pasture don't thrive like they should. The calves don't. They don't shed off like they should, and after the cattle has crossed this stream their legs become muddy and their udders muddy, and in several instances the hair has come off of their legs from this mud. The mud is black or bluish like a hog waller. These are blooded Hereford cattle offered for sale. I have taken prospective purchasers into this pasture. The last purchaser down there noticed the odor of the septic tank. In dry weather the conditions I have described prevail all along that stream, from the sewer outlet down to the junction. I am familiar with the rental value of the lands in close proximity to these towns. Versailles, Deepwater, Chanute, Kansas, Harrisonville, Hamilton, several of those places. Close to a town where you have the right kind of water we have been getting $2.50 to $3.00 a month per head for town cows. The special value is due to the proximity of the pasture to the town.

Q. "What would you say would be a reasonable rental value for the creek pasture of the plaintiff west of the Missouri Pacific right-of-way?

"Mr. Barnett: Just a moment. I object to that question for the reason, first that it is made applicable to town cows, by which I understand that he refers to cows owned by individuals here and there in town who pasture them out in the outskirts of town. There is no evidence that this pasture was ever used for that purpose before or after the connection with this sewage system, and I object to it for the further reason that this question of the rental value of that land is not the measure of damages here, even in the event the Court finds that the disposal plant in question is a nuisance because, under the testimony of the plaintiff's own witnesses, that plant was a nuisance from the time when it first began to operate, it is inherent in the character of the plant itself, and

in the nature of the plant itself, it can't be any better than that, and the measure of damages would not be a rental value of the land at all, but would be a measure of damages for some alleged infringement of the rights of the plaintiff
85 by a permanent nuisance, if any nuisance at all in this case."

Upon the assumption of plaintiff's counsel that he proposed to show the properties available for town cows the objection was overruled. To the ruling the defendant City then excepted and still excepts.

The witness continuing testified. I would think this pasture was available for the rental of town cows, because it is close to Harrisonville. For that purpose its rental value is something like $7.50 or $8.00 per acre per year. There is something like ninety acres in this particular pasture. About 150 acres west of the railroad and about ninety in this pasture. This land with good water in it would have had that rental value at all times during the last five years, but as it is, it is not available for that purpose because a man wouldn't want to pasture his town cow there giving milk for his family. It could be so used, however, if the pollution were removed from Town Creek.

"Mr. Barnett: I move to strike out all the testimony of the witness with reference to the pasturage for town cows. No such issue has been raised in the pleadings of this case.

"The Court: I suppose that if this is the question of rental value—I am not trying to decide that now—but I assume that any element that might tend to show the value for any purpose would be available notwithstanding the fact that the evidence shows that it is now and has been used for other purposes. The motion will be denied at this time."

Cross-Examination

Before this sewer system was installed the cattle drank the water all along Town Creek. Now they drink it below this sewer outlet only in times when it is absolutely necessary and that is in the far west end. The cattle graze all over the pasture. In my direct testimony about $7.50 an acre for town cows, I didn't mean to say that any one person would pay that much per acre for this entire tract, and of course whether there was any demand for this pasture for town cows would depend more or less upon the number of town cows looking for this kind of pasture and I have no knowledge about that. I know that about twenty years ago on the prop-

erty known as the fair grounds, the Dickey land on the east side of the railroad, they got about $2.50 a head for town cows. I don't know how many cows at Harrisonville there are on the market for pasturage as town cows, nor
86 how many there have been during the last five years and I couldn't give the name of a special transaction with reference to town cows.

Redirect Examination

We found a small spring in this Dickey land west of the railroad and dug it out the best we could and made a little bank around it in order to furnish water to help the cattle out in that pasture.

Recross Examination

That pond is on the north side of Muddy Creek. We dug it out a couple of feet deep. It is about 12 or 14 feet in diameter. We don't get very much inflow into the pond. Before it was out there was just a trickle of water that came from this spring, just a seepage spring and now making this pond we have about two feet of water. I don't believe that water escapes very much now. The cattle keep it pretty well drank up. When they go to drink there they often wade right out into the pond. No, I don't think I ever saw the cattle standing in the pond in hot weather because it is out in the sun. The cattle might defecate in the pond if they crossed over it. There would be no reason for them to stand in it. The pond does not get foul. I don't think so because there is not enough water left there to get stagnant. The cattle keep it mostly drunk up. Muddy Creek becomes polluted from the backwater of Town Creek after a rain. You can see the sediment on the banks.

W. S. JOHNSON called as a witness on behalf of the plaintiff testified as follows:

Direct Examination

I am Chief Public Health Engineer with the Missouri State Board of Health. I made an inspection of the Imhoff tank in 1925 and again in 1928 and also Town Creek into which the plant discharges. On my first examination I followed the creek around to a point approximately directly north of town. It circles around the west side and then around to the north side of town. It was in about the condition you would expect a creek of that sort, apparently clean. During

a dry period, when the flow is very moderate the water is fairly clean. There was no odor from the water. Below the outlet of the Imhoff tank into this creek it showed marked evidences of contamination, the usual appearances of
87 a polluted creek, black sediment in the bottom and a grayish, filamentous growth on the sides and bottom clinging to the rocks, typical of sewage contamination. This was unquestionably caused by the discharge from the Imhoff tank. Plaintiff's Exhibit 5 looks very similar to the growth and deposit in the bed of the stream below the sewer and is fairly typical of rather gross pollution of a stream with sewage. The condition of the stream was practically the same in 1928. When I examined the stream in 1928 the water just above the outlet was in the same condition as before, fairly clear.

If the biochemical oxygen demand of a stream is negative it shows a lack of pollution, that the stream is in good condition from an organic pollution standpoint. If there is a biochemical oxygen demand of 75 to 100 some two hundred feet below the outlet that indicates conditions of pollution in the creek. A loss of dissolved oxygen in a stream at one point as against a point farther up the stream indicates that in between there has been the introduction of some considerable contamination in the stream, which in the course of decomposition has used that oxygen up, such as sewage.

The Harrisonville plant is in an Imhoff tank with a sludge dry bed known usually as primary treatment. This is simply a settling out process of certain solids in the sewage, that is usually followed, if necessary, by a secondary treatment where a further stabilization of sewage takes place. An Imhoff tank only settles out a certain per cent of puterscible matter in sewage and the effluent therefrom will always contain organic matter that is not entirely stabilized and if in sufficient quantities will pollute a water course.

"Q. Now can the sewage of a tank like Harrisonville's be treated in such a way that the effluent into such a creek will not create the condition of pollution?

"A. Yes, sir.

"Mr. Barnett: Just a moment. We object to that question and ask that the answer be stricken out for reason that the character of the disposal plant, sewage disposal plant, to be adopted is a matter left to the discretion of the city authorities under the powers given to the city and state, and

that, if in the exercise of those powers the city has
88 erected a system which, in any way, is a nuisance, particularly a permanent nuisance, as the evidence of the plaintiff here tends to show, then the party affected has his right for damages as for a permanent nuisance, and it is not within the province of the Court to pass upon the question as to whether the city shall or shall not adopt some other plan of disposal; and we object to this testimony from this witness as we have objected to it from other witnesses."

This objection and motion was by the Court overruled, and to such ruling the defendant, City of Harrisonville, at the time duly excepted and still excepts.

"Q. Have you recommended, as a public health officer, such treatment for the sewage of Harrisonville?

Mr. Barnett: I object to that for the reason it is not material to any issues here what has been recommended. It is only a question of what might be required by law."

This objection was by the Court overruled and to the ruling of the Court, the defendant, City of Harrisonville, duly excepted and still excepts.

The witness continuing: We recommended additional treatment in a report, I think in 1925, to the City of Harrisonville.

There are towns in the state of Missouri, approximately the size of Harrisonville, in which there is complete disposal of sewage. They are Eldon, Hamilton, Higginsville, Kennett, LaPlata, Lathrop, Odessa, Plattsburg, Ridgeway and Unionville.

"Mr. Barnett: May I interrupt at this point? I am not going to object and carry it out further, but I want the Court to know that, according to our theory of the case, what these other towns do is not proper evidence here because the conditions may be entirely different there. They may have human habitations close to the place where the outlet occurs."

The town of Unionville discharges its effluent into a creek approximately the same size or a little smaller than Town Creek. At the time of my observations the condition of the water in that creek below the point of discharge was very good, clear, the bottom of the stream clean and the water in good condition with no such deposits of the character shown in Plaintiff's Exhibit 5 and no odors. We have on
89 repeated occasions recommended against the use of pasturage contaminated with city sewage for cattle,

milk producing cattle, dairy cattle. That is quite a dangerous procedure. You might get contaminated material on the udders of the cows and that may contain disease producing organisms that might be introduced into the milk at the time of milking with disastrous results to the consumer of the milk.

Cross-Examination

I was not the engineer of the State Health Department at the time this plant was erected and in going over the correspondence I haven't found any formal approval of the plant. Although we do have some correspondence between the city's engineer and Mr. Putnam, the engineer of the State Board who preceded me, relative to size and capacity. Yes, sir, the attention of the State Board was called to the intention of the City of Harrisonville to put in this disposal plant. The Imhoff tank treatment represents an advance in the matter of sewage disposal even for primary treatment over what was commonly known as the old septic tank. These Imhoff tanks were first built in Germany and brought over to this country about twenty or twenty-five years ago and installed as an improvement upon the old septic tank. Yes, sir, it is true that the requirements of our department have become more rigid concerning the treatments of sewage since 1923, when this plant was installed, and things required today were not required in 1923. Also is much better to use this Imhoff system than to dump the raw sewage into the stream outlet. I never had my attention called to Town Creek before 1925 and my comparison has been of the waters above and below the outlet since that time and since the tank has been discharging into the creek. I have no personal knowledge of the character of the creek before the construction of this plant. Yes, sir, probably the collection of the sewage in a central system of this kind and a deposit of it through the lines would probably decrease the amount of waste that would ordinarily drain into this creek above the outlet. Yes, sir, the city of Unionville, of which I spoke, made the installation of its plant since 1923 and both the Unionville and LaPlata plants have been installed since 1923. I haven't the exact date. There are a total of eighty-four sewage treatment plants in the state and of that eighty-four twenty-three have both primary and secondary treatment. The remainder have only primary treatment, either Imhoff tanks or
90 separate sludge beds. About 70% of the cities have the primary system. This includes all the treatment

plants in the state but does not include St. Louis, Kansas City or St. Joseph, which have no treatment but discharge the raw sewage into the river.

Redirect Examination

By Mr. Hazard:

"Q. Mr. Johnson, when you say there are twenty-three out of eighty-four that have both primary and secondary treatment, that does not mean that all of the remainder need both primary and secondary treatment, does it?

A. No, sir.

Q. For instance, as Kansas City and St. Louis and St. Joseph and in fact, any city on a large stream or river, may discharge its sewage directly into the river without any treatment whatever, may it not? A. Yes, sir.

Q. Have you any figures to show what the percentage of towns have both primary and secondary treatment where it is needed?

A. Well, in this same article which I quoted before, our summary indicates there are about twenty-seven towns in which the treatment is insufficient. That is, either they haven't got any treatment at all or it isn't sufficient treatment. They have only primary treatment without the secondary.

Q. Twenty-seven out of eighty-four have insufficient treatment? A. Yes, sir.

Q. And is Harrisonville one of the twenty-seven?

A. Yes."

There was in the year 1923 the improved method of both primary and secondary disposal and it would have been possible to have constructed at that time a plant which would completely reduce the sewage. According to our regulations now in effect the city must have the plans approved before the contract is let and also an approval after final inspection before the work is accepted. The state board will not give an approval without reserving the right to inspect, supervise and pass on the plant at a later date. Our present regulations which require approval by the State Board of Health were not in effect in 1923, but passed by the Board on April 3, 1928. The article I spoke of in which I noted twenty-seven out of eighty-four cities in the state as having insufficient disposal systems was an article which I personally published in the Sewage Works Journal, October 1929, based on data collected during my regular official inspections of various plants in the state.

91

Recross Examination

"By Mr. Barnett:

Q. When you spoke of twenty-seven of the eighty-four cities having insufficient disposal systems, you were reading from some article there. Now, as I understand it, that is an article which you yourself wrote? A. Yes, sir.

Q. And you were expressing simply your personal, individual judgment about the matter. That isn't any rule or regulation which has been adopted by the Health Department?

A. This article, I might explain, is the result of mine and my assistant engineers' examinations of all the sewage plants in the state. That examination has probably been taking place for the last three or four years, and as a result of that inspection we come to certain conclusions, regarding the plants as to their adequacy and their methods of operation, etc., and this article is based from that information that we secured from those surveys.

Q. And your function as State Health Officer is to have in mind the matter of the general public health, isn't that it?

A. Yes, sir.

Q. It isn't the function of your Department to go into the matter of cattle diseases or anything of that kind except as it might have some reflection upon the health of human beings?

Mr. Barnett: That is all.

Redirect Examination

By Mr. Hazard:

Q. This report from which you are reading, is that the basis upon which the State Board of Health makes its regulations?

A. No, the regulations under which we are operating now were written before this report.

Q. Well, what I mean to say is would such a report as that, based upon such a study as you have described, be the basis for regulations by the State Board of Health?

92 The Court: Even so, it would be little more than a memorandum, of course, because it emanates from him; he is expressing the same idea here.

Q. I simply want to bring out, of course, that it is not just a report which some one writes out of the blue, but is based on a study of the conditions.

The Court: You can ask him whether it is or not; I don't know whether it is a report or just an article. He called it an article.

Q. What is the basis of the report from which you are reading?

A. Under our regulations, we manage to make an inspection of each sewage plant in the state each year, and after each inspection that data is properly collected regarding the plants and filed. Now, this article is simply a summary of that data we secured during our regular inspections and surveys, which are made in accordance with our regulations.

Q. Based on the data secured in the survey?

A. Yes, sir.

Q. It is not an argument in any sense of the word?

A. No.

Q. What is that volume you have in your hand there?

A. This is the Sewage Works Journal, October, 1929.

The Court: Was it ever submitted to the State Board of Health, that article?

A. You mean the board members themselves?

The Court: That article, yes.

A. The board members?

The Court: Yes.

A. No, sir.

Q. You referred to the present regulations as requiring approval for the plans for sewage disposal plants from the State Board of Health. Was such a regulation in force in the year 1923?

A. No, these present regulations were passed by the Board April 3, 1928.

Q. And you do not know whether there were such regulations in force in 1923 or not? A. No.

Mr. Hazard: I think that is all.

93 Recross Examination

Yes, sir, the plant erected at Unionville and the one at LaPlata which I have designated as satisfactory were erected by the same engineering firm which built the plant at Harrisonville.

CHARLES F. WOODLING.

Charles F. Woodling called as a witness on behalf of the plaintiff testified as follows:

Direct Examination

I live in Kansas City and my business is general contracting, in which I have been engaged for twenty-six years. I

have examined the creek on the plaintiff's land at Harrisonville from the septic tank outlet to the lower boundary of the farm with a view to determining the cost of removing the deposits that are there at the present time and of cleaning the pollution out of the stream. I have had experience in work of this general character. We excavated a simi-
94 lar ditch all around the New Orleans race track for the same purpose, to take off offal, drainage water, sewage water from the various utilities used around the track, into a canal. The deposits in this Town Creek would not be removed naturally.

"Q. Now based on your experience as a contractor and in doing work of similar character, have you estimated the cost of removing the deposits and cleaning up the pollution in this particular stream from the septic tank to the lower end of the Dickey farm?

"A. I have.

"Mr. Barnett: We object to this question and this line of testimony for the reason that, if any nuisance exists here at all, under the plaintiff's own evidence it is a permanent nuisance and the measure of damages is damages for a permanent nuisance, which would be a decrease in the value of the land caused by this structure, and we object to this line of interrogation for the reason that it is calling for an improper measure of damages.

The Court: I may say, so we will not have to worry with objections, there is no question, if you state the law correctly, in those cases where there is a permanent damage to property and where the necessity requires the use of the property. I think in this case in 244 Missouri, Smith vs. Sedalia, the court states what the law might have been there in stating the case, when it says that 'No practical way has been demonstrated for disposing of this sewage other than by the use of this water course, which is the natural drain for that purpose of that city. Plaintiff attempted unsuccessfully, we think, to show that septic tank would satisfactorily dispose of the sewage'. Then of course they discussed the proposition that they rejected the evidence as being insufficient to show it might have been so disposed. Now I assume that counsel in this case contravert the question of the permanent invasion or encroachment upon this land. If that is true, then unquestionably you state the law. If the city in disposing of its sewage must necessarily use this water course then that is the end of it; plaintiff is not entitled to recover in this action, his remedy is by damages as you suggest. But if there is a means by which this sewage can be

reduced where the city does not have to encroach on
95 his land and that is counsel is seeking to show, then, of course, the plaintiff would have a law suit here. That is the whole issue here in this case."

(To the ruling of the court plaintiff then duly excepted and still excepts)

Witness continued:

I estimate that it would take around $3500.00 to clear the creek up and clear the pools out and cut a new by-way by the pools, that is, on account of the pools being hard to clean out. It would cost less money to cut a new creek by the pools because it is hard to determine how deep that water in the pools is and the sum of $3500.00 in my opinion is a reasonable and fair estimate of the cost of such work.

Cross-Examination

I estimate that it would take about 8500 yards of earth removal. In places my cost would run from 30 to 40¢ per cubic yard. Other places where we would have to wash we would have to bring in a pump. The ditch would be about 4 feet deep down from the soil level, in some places 5 feet.

"Mr. Hazard: With the exception of introducing a copy of the Articles of Association and Incorporation of the plaintiff, if we deem it necessary, and which counsel for the defendant agree that we may introduce later, the plaintiff rests.

"Mr. Barnett: At the close of the plaintiff's case, the defendant, City of Harrisonville moves that the action be dismissed for the reason that, under the pleadings and the law and the evidence, it is shown that the plaintiff has no such cause of action as plaintiff endeavors to recover upon here; that under the evidence it appears that this Imhoff tank is a permanent concrete structure, the lines and pipes leading to it are a part of the general sewer system of the City of Harrisonville, and that the damage, if any, existing, which the plaintiff claims here, is damage which is inherent in the very use of this plant and has been from the beginning, and that the nuisance, if any, arising from the use of this plant is not such as may be excepted to be discontinued in any way, except by additional work, the application of further work upon the plant in some manner or upon the entire problem of sewage disposal for this
96 town of some 2,000 people according to plaintiff's own petition; that the nuisance, if any, is a permanent

nuisance, that its character as a nuisance was discovered immediately after the operation of the plant, and that, if any remedy at all is to be granted to the owner of the property upon which this effluent was discharged, that remedy is an action for damages as for a permanent nuisance under the evidence in this case and it was clear that there is no ground for application to a Court of equity and there have been shown no damages as of the character to support any recovery as for a permanent nuisance and for that matter, not any sufficient evidence if we were to pass to the theory of a temporary nuisance to support recovery upon the basis of a temporary nuisance. For that reason we move the action be dismissed.

To these grounds of my motion, I wish to add this further ground; that insofar as there is properly any issue before the court concerning some plan for modifying or analyzing the present sewage disposal plant the evidence is wholly insufficient on the part of the plaintiff and fails to show that the City of Harrisonville is financially able to construct a plant which plaintiff advocates as supplementary, and for the further reason that under the Constitution of the State of Missouri the City of Harrisonville is without the means with which to make this additional improvement.

"The Court: Motion denied.

"Mr. Donaldson: Defendant, Missouri Pacific at the conclusion of all the plaintiff's testimony moves for the dismissal of the bill as to the Defendant, Missouri Pacific, for the reason the bill does not state facts sufficient to constitute an action against this defendant, the pleadings disclose there is no right of action against this defendant herein and that the evidence has wholly failed to show any evidence against the defendant, Missouri Pacific."

This motion the court denied.

(To this ruling and action of the court with reference to the motion of the defendant, City of Harrisonville, and the motion of defendant, Missouri Pacific Railroad Company, the defendants and each of them at the time duly excepted and still except.)

Thereupon the defendant, City of Harrisonville introduced evidence as follows:

97 W. B. ROLLINS, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I am a consulting municipal engineer living in Kansas City, Missouri, a graduate and post-graduate of the University of Missouri, Engineering Department, class of 1903. I became engaged in municipal work in 1905 and for three or four years was associated with other firms and in 1908 began business for myself, and since that have designed and supervised the construction of approximately five hundred municipal proceedings in Missouri, Arkansas, Oklahoma, Kansas and Iowa. Among these plants were the sewage disposal plants, one located at Unionville and the other at LaPlata mentioned by the State Engineer, Mr. Johnson.

My first connection with the matter of sanitary improvements of Harrisonville was about 1914, when we planned a plant to take care of the city's requirements. This did not go through and there was more or less agitation about it until 1922 when active steps were taken towards the construction of a complete sanitary sewage system for the city. At the time it was suggested the City asked the State Board of Health to make an investigation and report. Mr. George W. Putnam, then State Sanitary Engineer, made a study and mailed a report to the city under date of January 13, 1923, sending us a copy.

At this point the plaintiff objected to the offer in evidence of the copy of the State report of January 13, 1923, upon the ground that it was not the best evidence and this objection the court sustained and thereto the defendant, City of Harrisonville, at the time duly excepted and still excepts.

Witness continued:

We made a number of investigations and surveys, studying the sanitary conditions, methods of improving them, and in our study we found that there was the old type of septic tank which has been installed at Harrisonville for a number of years, located approximately on the south bank of the so-called Town Branch, and this septic tank carried sewage from the Court House, hotel, all of the uptown district, and a number of private residences that were connected to that private system, which I understand had been built by
98 the county court. Our study revealed that there were more than 100 private sewerage systems in the City of Harrisonville prior to the time that the City at large undertook the construction of a general sewerage system. A great many of these naturally were connected to this line extending from the uptown district to this septic tank,

which was located on the bank of Town Creek, and the effluent from that tank produced a nuisance in the vicinity and also a nuisance in the Town Creek, and it was partly to get rid of this nuisance that the City wanted to construct a general sewerage system to take care of the city at large.

Practically all of the city from the Court House Square north and from the Court House Square west has its drainage into this Town Creek. The south and east portions of the town have their drainage into another creek which flows off into a southwesterly direction, and I think eventually reaches Grand River. I observed Town Creek a number of times before this sewer system was built, and also the other small streams which carried the drainage from the City.

One of the main points desired by the City in having a general sewerage system constructed was to remove the very unsatisfactory condition around the old septic tank, which was located on the south bank of Town Creek. Naturally when the new system was completed and the sewage taken from that, which, prior to the construction of the new system, only had the old Cameron tank treatment and entered Town Creek in a much less purified condition than would be the case with the ordinary Imhoff tank, the condition of Town Creek above the present point where the effluent reaches that creek would be changed, but at that time the Town Creek was very much polluted from the location of the Cameron tank, which was right in the residence district, clear around to the confluence with Muddy Creek, showed signs of pollution. I traversed it time and again from one end to the other and it showed very evident signs of pollution. This was true of Town Creek all the way from the uptown district where the septic tank was located clear down to Muddy Creek. Although it varied in various parts of the creek, this creek also carried surface filth from all of the north and a great portion of the west part of town because of the natural drainage, and it is a very steep incline and heavy rains would wash the surface filth from the
99 north part of town and part of the business district that wasn't fully sewered, and all the west part of town and finally reached this Town Creek and was carried away in this Town Creek, and it was very unsightly and ill smelling from town clear down.

There are four railroads into Harrisonville; the Missouri Pacific runs through and has its station in the north part of town; the Katy has its station in the north part of town; the Frisco has its station in the north central part of town, and the other branch of the Frisco has its station in the

west part of town. This Town Creek took the drainage from the Frisco and from the Missouri Pacific and Katy and eventually caught the drainage from the other Frisco station in the west part of town. The Missouri Pacific and the Katy are on the north side of the creek and the creek flows through the part of the land, through those railroad stations and yards and freight houses. The water in Town Creek was not before the erection of this Imhoff tank and is not now at any place in the creek fit for human consumption.

After the agitation to which I referred previously, followed by a letter from the State Board of Health recommending to the city that they establish a general public sewerage system, we were authorized to complete surveys and prepare plans and specifications. This was in the fall of 1922. An election was held about the first of January, 1923, the first part of the year, and bonds were voted, based on our estimate, which provided only for primary treatment. One of the reasons that we did not design a more elaborate plant, as we have for a number of other cities on the basis that they ultimately might need a more elaborate plant, was that the city's bonding limit would not provide for a more extensive plant at that time than the approximate amount of bonds that were voted. After we prepared the plans and specifications we submitted them to the State Board of Health for approval. We sent them the plans for this system as it was eventually constructed, and in reply we received this letter dated March 22, 1923, marked defendant's "Exhibit A". Mr. F. H. Frauens to whom it is addressed was one of the assistants in my office.

100 Defendant's Exhibit "A".

"Missouri State Board of Health
City of Jefferson
March 22, 1923

Mr. F. H. Frauens,
W. B. Rollins & Company,
Consulting Engineers,
521 Railway Exchange Building,
Kansas City, Missouri.

Dear Sir:

Your letter of February 16th was noted on our return to the office following a period of illness. Due to the press of work in preparing Data and reports for the Legislature, we have been unable up to this time, to check over the plans submitted.

We are pleased to note that you decided on the liberal capacity of one hundred thousand gallons per day, and approve of the general details of the design. We would suggest including in the specification and showing as a note on the blue print 'The sloping walls of the settling chamber to be plastered smooth with a coat of neat cement, so as to leave no projections, ridges or uneven surfaces.' In our inspection of many existing treatment plants, we have found that sludge was accumulating in the settling chamber, due to such defects which caught the settling sewage and gradually caused the filling of this chamber with sludge.

We note that the sludge capacity taken below a horizontal plane eighteen inches below the slots is approximately 1,070 cubic feet, or about one half cubic foot per capita. On the bases of .0052 cubic feet of sludge per capita daily, from a separate system with a sewage flow of fifty gallons per capita daily, and serving two thousand population, this will permit a sludge storage period of only one hundred days.

We prefer to see a minimum storage period of six to seven months, which is about equivalent to a total sludge capacity of one cubic foot per capita.

We note that the outlet of the sludge pipe is only six inches above the top of the sludge bed. With an accumulation of ten and one half cubic feet of sludge daily. This would require drawing sludge every three weeks, if the depth were limited to six inches. We would prefer to see the
101 distance between the bottom of the sludge pipe and top of the sludge bed increased to at least fifteen inches, so as to permit drawing sludge bed increased to at least fifteen inches, so as to permit drawing sludge to a depth of ten inches at longer intervals.

We understand that your contract has been undoubtedly let by this time, and only regret that our illness prevent taking these points up with you earlier. We expect to visit one or two towns in the vicinity of Harrisonville on sewage matters, and would very much appreciate your furnishing us a brief summary of the contract figures for comparison purposes.

Very truly yours,

GEORGE W. PUTNAM,
State Sanitary Engineer."

The plaintiff stated that it had no objection to the letter, defendant's Exhibit "A", which was offered in evidence.

Witness continued:

Concerning the requirement suggested in this letter of the State Board of Health about the sloping walls being plastered smooth, I wish to say that we did that work in the actual completion of the tank. Also we changed the sludge capacity and made it one foot, as Mr. Putnam suggested. The capacity of the plant as built figures 1920 cubic feet. We estimated that there would probably be two-thirds of the city eventually served by that plant, and on the basis of about 2000 population, there would be 1200 or 1400 people, so that our actual sludge capacity was a foot and a half, one and a half cubic feet per capita instead of one foot. A part of the City of Harrisonville is not served by this plant, but by a different type of septic tank, so that the Imhoff tank does not carry the sewage from the entire city, but does carry the sewage from all of the north and west parts of the city. It is only in the last five or six years that the State Board of Health has requested these plans and specifications to be filed and formal approval given before the work is constructed. Prior to that they only asked to be notified so that we have no formal approval such as we receive today in the construction of plants.

102 "Q. Is the capacity of that plant as it was erected there sufficient to take care of the needs of the City of Harrisonville?

A. Sufficient to take care of the population for which it was designed.

Q. And as I understand it, this letter from the State Board of Health required a capacity of one cubic foot per capita and the plant as actually constructed provides a capacity of one and a half cubic feet per capita?

A. On the estimated contributing population to this system. In other words, about four-fifths of the town is contiguous and will be served by this plant."

103 Imhoff tanks have been in use in this state only ten or twelve years, although prior to that they were in use in Germany and some states of the United States. It is only in the last six or eight years that they have been in general use in this state. All health authorities agree that Imhoff tanks represent a marked improvement over the old type that was in use prior to the construction of the new system.

The Imhoff tank operates in the following manner:

The collecting system is composed of vitrified clay pipe, which, in this particular case, was manufactured by the plaintiff. The disposal plant itself consists of the concrete basin, known as the Imhoff tank, which is a hopper bottomed affair. All of the sewage collected by the collecting system is carried into this tank by means of inlet lines from the distributing manhole. There are two compartments to the tank, either one of which may be used without the other. In fact, in the early stages of the operation, we found that the improvement would be made in the operation by cutting off one of these compartments and using the sewage only in the other half of the tank. After the sewage enters the tank, it flows through in a very slow manner, having about two to four hours detention period. During this period the solid matter, a large proportion of it, is settled out into the hopper or digestion chamber as it is called. The liquid from the sewage goes out the other end of the tank over a weir into a trough, from that through into a collecting manhole and from this collecting manhole through the outlet tile pipe line under the Missouri Pacific Railroad track into Town Creek.

An Imhoff tank is supposed to give from fifty to sixty per cent purification; that is, about 50 or 60 per cent of putrescible matter is removed in an Imhoff tank, if it is properly operated. The weir over which the liquid flows into the collecting trough is a very fine straight steel edge and is so set by the use of an instrument that only a very fine film or liquid flows over the entire length of the weir into the trough, giving an opportunity, of course, for the aeration of the liquid as it flows over, and the trough being open at the top also permits aeration of the liquid before it gets into the closed manhole.

104 Page 1 of defendant's Exhibit "B", consisting of three different blue print pages, represents a map of the City of Harrisonville, showing the arrangement of the collecting system of the sewers, and also the location of the disposal plant at the southwest edge of town adjacent to the Missouri Pacific railroad. Town Creek is shown here very clearly, rising in the northeast part of town, connecting with Lake Luna, formerly used by the City as a water supply, flowing through the low land in the north part of town near the railroad stations, flowing under the tracks of the Kansas City Clinton & Springfield Railroad on the west side of town near the Oakland cemetery and thence further southwesterly

until it crosses the Missouri Pacific tracks onto the plaintiff's land. Oakland Cemetery is a cemetery which has been located beside this creek ever since I have known anything about it. The creek generally flows through the low land lying between the railroad stations and the town which all drain into this creek.

The main trunk line shown on this blue print for the north and west part of town is shown by this heavy solid line skirting Moudy Pond and extends on up to a point opposite the north part of the business district. The blue print shows another trunk line branching off at about 300 feet from the disposal plant, which collects the sewage from the south and west part of town. There is a lateral line up Mechanic Street and other streets. Most of the south central part of town is cared for by a little private septic tank, that part of town being too low to get into this district.

Page 2 of the blue print, defendant's Exhibit "B" is a plan of the disposal plant. The circle at the top of the plan is the distributing manhole where the main trunk line from the city enters. The by-pass line, spoken of by Mr. Black, is shown here as the dotted line running straight from this distributing manhole over to another manhole in the left side of the blue print and from that manhole the conduit conducts the sewage or effluent on down to the bottom of this plan in the direction it takes in passing under the Missouri Pacific tracks and into Town Creek. The purpose of this by-pass is twofold. First, to assist the contractor during the construction period and next, after construction to serve as a by-pass for the sewage, if necessary to by-pass it for any purpose. The
105 contractor naturally begins his work at the low point because he wants all the water that gets into the system to run through and get away and he uses this by-pass for that purpose. After construction and the beginning of operation of the plant the valve of the by-pass is closed and the two valves leading to the two compartments of the tank are open, or at least one of them, so that the sewage may flow directly into the tank for treatment. The tank shows three divisions. The plant consists of the sedimentation tank, and of the sludge bed and the sedimentation tank consists of two compartments on the side called the settling compartments and of one compartment in the middle called the digestion compartment. The sewage comes in to one or both of these settling tanks at the upper part of the blue print by the conduits from the distributing manhole and flows

very slowly across the tank with the solids settling to the bottom along the sloping walls which carry those solids to a point directly under the center compartment of the tank. There these solids undergo a fermentation process and the gas rises therefrom until it reaches the surface of the tank in the middle compartment. Those gas bubbles go straight up and because of the construction of the slanting walls of the two outside upper compartments of the tank the gas does not come up through those two outside compartments. At periods of two or three months, as investigation may reveal necessity, the sludge accumulated in the hopper of this tank is discharged from the tank by means of a pipe shown on the blue print at the top of page 3. This cast iron pipe sets down near the peak of the hopper bottom. By opening this valve in the outside called, "Gate valve", the pressure of the water above exerts force on the liquid mass, forcing it up into this pipe and out onto this sludge bed, a cross section of which is shown at the top of page 3 of the blue print, Exhibit "B". This sludge bed consists of sand and then pea gravel under the sand and then crushed stone under the pea gravel and finally a collecting system of tile which collects the water as it drains off the sludge, which has been discharged from the disposal plant, and that liquid, of course, is carried over to the same manhole shown at the left of the blue print on page 2 and from there discharged by the effluent line from this manhole by conduits under the railroad right-of-way and into Town Creek.

106 This description has followed the operation of the disposition of the solids. Now then the liquid sewage which flows into the tank from the distributing manhole flows very, very slowly across the tank until it comes to an adjustable weir on the far side of the tank and flows over this weir by a very fine line and into a collecting trough just beyond the weir and from this trough by conduits over to the manhole at the left of page 2 of the blue print and thence as the effluent from this tank by tile conduits across a railroad right-of way and into Town Creek.

Returning to the sludge that is left on the sludge bed. The operation is to allow this sludge to dry when it is then taken off and used as a fertilizer. This drying process depends upon the weather and usually takes a week or so. It becomes a dark gray powder, practically odorless and is used as fertilizer, although in cities of the size of Harrisonville the volume of the sludge is not sufficient to be commercially valuable.

Before this plant was completed, a month or two before, any sewage was conducted through this system Mr. Dickey's superintendent made a complaint to the city, stating that the city sewage was damaging his water supply. When he was told that the system was not completed and wouldn't be for another month, he quieted down. I was in the employ of the city all of this time under the city officials. After the plant was constructed we filed a set of rules which were submitted to and approved by the State Board of Health for the operation of and attention to Imhoff tanks. We filed these rules with the City and dropped in occasionally to see whether the plant was receiving the attention that it should. On one occasion we found that an attempt had been made to remove the sludge from the tank, but that the sludge removal pipe had been clogged at the bottom due to some clay or dirt or other foreign material, which had not thoroughly been flushed out of the sewer lines previously and had gotten in some way. It then became necessary for the city to pump and remove by buckets and other means practically all of the sludge, both that which was properly digested and that which was not, and discharge it where they could; part of it went into the pipe line and part went out on the ground. That was, I believe, in 1924, about a year after the completion of the plant. Now
when this was going on the by-pass was of course used
107 by which the raw sewage was conducted from the distributing manhole to the manhole on the left side of the blue print on page 2 and thence into Town Creek. Otherwise the sewage would have backed up in the lines and have caused the citizens inconvenience. This sometimes happens in the construction of a new plant. It is an emergency occasion but is not to be expected afterward. I have visited the plant from time to time since then and found that on some occasions it was not receiving all of the attention it should and on other occasions that it was receiving proper attention. There was practically no odor along the outlet on some of my inspection trips to the Town Branch through Mr. Dickey's pasture. While in other cases there was. When the plant is in operation the effluent discharged therefrom carries some finely divided particles about the size of a pin head. In my many inspections of the tank I have never seen anything larger than that passing out in the effluent.

On one occasion at my request Mr. Johnson, the State Health Engineer, met me at the plant and we went over together, and we detected an odor when we were walking along the creek, but thirty to forty feet away we were unable to get

any odor. This was walking along the creek on Mr. Dickey's land below the outlet, probably 150 to 250 yards below the outlet.

This stream is a typical town branch. It carried the surface drainage from every freshet, and a number of residences located further up in town having outside toilets and located as close to it as they can be, and naturally they get some drainage in times of freshets, and it is the depository of a lot of tin cans and buckets and all sorts of rubbish and trash, and I never saw it when it was anything else but unsightly, either before the construction of this sewerage system or since. The stream above the outlet is clogged in various places with old vegetation, decayed leaves and twigs and things of that kind. In some places the weeds are grown up in it across the bottom so that they would naturally clog slow flows and catch floating particles, and in other places there is brush that has been thrown into it so that it would catch anything of that sort, and at no time during any of my observations was it a clean, clear flowing stream. I have seen stagnant places along
the stream in low water periods where it was pretty
108 well covered with scum and bubbles coming to the surface, indicating decayed matter, gases coming to the surface. I am speaking now of the creek above the sewer outlet. Occasionally there is an odor above the creek. Nearly all Imhoff tanks have a slight odor and the odor may be worse, at one time than another, depending upon the operating conditions. I know of the slaughter house along this creek and have been along there when it was being used or after it had been used and the discharge from that slaughter house entered this Town Creek above the sewer outlet, but I don't know whether the slaughter house is active at present.

Cross-Examination

I am not sure that I can locate on the blue print exactly the old septic tank. I have been to it many a time and it is still there so far as I know. It was up here in the north part of the second ward. It came down a little draw leading off of Town Creek. The circle I have put on this map, Exhibit B, indicates the approximate location. The sewer from the Court House ran into the old septic tank. It was for the purpose of serving the Court House and the hotel and the uptown district, the square and other places off the square. The

septic tank discharged at the top and the discharge from it entered Town Creek somewhere above Moudy Pond, which is about half a mile above the Dickey land. Town Creek is a slow, sluggish creek.

At the time we began our work we found 100 private sewer systems in the town. They were not all connected with this septic tank. It drained I would estimate 50. I did not count the connections, but I would say probably 40 or 50.

The map, Exhibit B, indicates that Town Creek flows into a pond just below the old septic tank.

"Q. So that all of that sewage would pass through that body of water?

A. If that body of water is there all the time. A pond is there today and gone tomorrow sometimes.

Q. Well, it was there in 1923?

A. It was there part of the time.

Q. Well, what part of the time?

A. It was there when we made the map."

109 "Q. Yes, and a body of water of that kind will tend to purify sewage, will it not? A. No, sir, not a pond.

Q. Not a pond? A. No, sir.

Q. Why not?

A. Because it takes a running stream where you have some ripples. Pond water is the most stagnant water there is.

Q. Would there be oxygen in that pond water?

A. Sure.

Q. Well, does oxygen purify sewage?

A. Yes, that is practically the only thing that does.

Q. I see. Well, then, if you put sewage in a pond where there is oxygen, would there be some purification go on?

A. I never heard of anybody putting sewage in a pond. I don't know.

Q. Well, sewage went into this pond, didn't it?

A. Probably a good deal of it stuck along the edge if it did.

Q. And would be held there and wouldn't flow on down to Mr. Dickey's land, would it?

A. Chances are a good deal of it lodged there."

110 The old septic tank was close to some negro shacks.

One reason the City wanted to build a sewer plant was because of the complaint against the septic tank. Also because that system only served a small portion of the town and did not give a very satisfactory reduction of the solids. It wasn't an approved type of tank. Also, the City wanted a comprehensive system for the entire town.

"Q. Well, you covered the whole town with the new system, did you not? A. Yes, sir.

Q. And this old system just covered a little portion there leading down from the square?

A. That is correct, but the city did not have any water works until 1929, so they didn't use that system."

Yes, the City formerly took its water supply from Lake Luna, when it was served by a private plant back in 1923. The water from Lake Luna overflows into Town Creek. No, sir, that Lake Luna water was not pure water. The city did not drink it—it was a town cow pasture and all the town cows were pastured around that lake. It was a private water supply and nobody in Harrisonville used it to drink or hardly to bathe in. It was a water you could hardly wash your face in because it smelled to high heaven. By a private plant I mean it was owned by a private corporation. The water was used to put out fires and sprinkle lawns. The City had no water works, but we just got through building one last year. I never was around the lake itself and can't tell about the odor there, but I do know there was plenty of odor from the water that came from it. I used it in the hotel. It was used to flush the toilets. It was piped to the square and all over town. It was not used for domestic purposes. I don't know but I wouldn't wonder if the horses drank it, but the people didn't. No, sir, I made no laboratory tests of Town Creek in 1923. My statement that it was polluted at that time is based upon twenty or thirty years experience and observation of other similar creeks and pools and seeing the results of samples, tests made of other similar streams.

The plant we built might have been of different design but that particular one seemed to suit the conditions there and the amount came within the limits which the officials felt would be wise to try to carry. A more elaborate plant might
111 have been built had the City's bonding limit permitted. I built the best plant I could with the money I had to work with. This is only a primary sewage disposal plant and has no secondary feature whatever. It reduces sewage about sixty per cent and the effluent from the plant is putrescible.

Whether that effluent will create a nuisance in a small body of water depends entirely upon the amount of solids and the care taken of the plant and the amount of water flowing in the stream into which the effluent flows. It may or may not be septic. A process of oxidation goes on from the time it

leaves the plant until it is completely oxidized. That process creates grayish deposits, sometimes dark. Plaintiff's Exhibit 5 contains typical samples of such grayish deposits.

No, sir, it is not possible to completely reduce sewage. Nobody ever said that. A secondary plant will produce an effluent which will remain stable, so that a small body of water will carry it off without septic action, provided the plant is properly designed, constructed and attended. I have designed several such plants and their operation has been successful. The effluent from the Unionville plant flowed into a stream about the same size as Town Creek. I have examined the water of that stream, but it is not altogether clear, slightly clouded sometimes. I have never observed any deposits of sewage made in that creek.

There was an alleged nuisance at Unionville which was made the basis of a suit by property owners with the result of a judgment for the city, the Court finding that there was no nuisance in the creek.

"Q. Now, you said that this Imhoff tank was designed sufficient to take care of population for which designed? Now for how many persons did you design that tank?

A. About fourteen or fifteen hundred.

Q. And what was the population of Harrisonville in 1923?

A. The population in Harrisonville is about two thousand, has been that for years and years; only fifty or sixty per cent of a town of that size is ever sewered.

Q. Now, do you recall what the capacity of the settling compartment is? A. 1965 cubic feet.

112 Q. And isn't it true that that is the capacity for only 995 people? A. No, sir, it is not true.

Q. How do you determine that that capacity is sufficient for 1500 people?

A. The State Board of Health rules at that time called for one cubic foot of sludge capacity per population to be served and we designed this for one and a half, making a fifty per cent increase over their requirements.

Q. Well, did you yourself consider that sufficient?

A. That was fifty per cent greater than the State Board of Health was requiring at that time.

Q. That isn't what I am asking. I am asking if you yourself considered it sufficient?

A. A foot and a half per unit?

Q. Yes.

A. I did; I didn't pretend to go over the State Board of Health.

Q. You mean you were governed entirely by the standards that the State Board set?

A. Not entirely, but I felt that it was not wise for me to place my judgment over theirs.

Q. What do you mean "not wise"?

A. Well, I assumed that their minute study of the matter gave them perhaps as much or more information on the subject than I would have."

We designed the plant for 100,000 gallons per day flow. I don't remember offhand on our check what the number of houses in Harrisonville was. I would judge it was around 500. No, sir, I didn't say there were 50 houses in Harrisonville on the old line that went to the septic tank. I said 50 services. The plant as designed was adequate I think for the City of Harrisonville. In any city of that size all over this state and any other state there is at least one-third of the population that cannot be sewered because the houses cannot be made modern, very cheap type, have no basements, no way of making them modern. Harrisonville is not any exception to the rule. About one-sixth of the possible services of the City of Harrisonville went into the old septic tank. It is impracticable that every house in Harrisonville would connect with this present sewage system. It is never done in any town, not even in Kansas City, Missouri, although the city makes an effort to get that done. The connection of the whole city with the city sewage system is an ideal condition never realized. It might be done if a person were developing a city like R. A. Long is at Longview, have every house sewer connected.

113 "Q. I see. Now, Mr. Rollins, when a city has no sewage system and uses private disposal plants, the seepage is slow, is it not? A. The seepage from what?

Q. From the private sewage plants connected with dwellings?

A. Depends on the general contour of the town, whether it is slow or fast. If it has extremely steep hills, every time there is a freshet, surface drainage is washed into the natural drainage course.

Q. Yes, and when there is a freshet there is a greater volume of water to dilute the sewers, is there not?

A. Should be to a certain extent, yes.

Q. And therefore the pollution is accordingly reduced?

A. For the time being.

Q. And when the time is dry, then there is no wash and there is a gradual seepage through the soil, is there not?

A. A seepage or surface drainage. A good many of these little septic tanks have a surface outlet and they run along the drains and gutters.

Q. And there is a purifying action in progress during that period of seepage?

A. A certain amount of oxidation takes place, yes.

Q. Now, assuming that there are 500 houses in the City of Harrisonville and that there were fifty connections to this old plant and that the present plant now has a capacity for 100,000 gallons a day, and that of that 100,000 gallons at least forty per cent must necessarily go into Town Creek in a septic state, wouldn't you say that there must necessarily be more sewage going into Town Creek now than there was before the present plant was built?

A. Please repeat that question. You had so many questions, I don't quite understand.

Q. Of course, in order to examine an expert, I have to ask a question which involves all the factors, but I will ask it again.

(The preceding question was read.)

A. I do not assume that forty per cent is going in in a septic state.

Q. You said yesterday that an Imhoff tank had a max-
114 imum capacity to reduce sixty per cent of the sewage that goes through it.

A. Sixty per cent of the putrescible matter.

Q. Yes. Now that means that at least forty per cent of the putrescible matter goes through the tank untreated, does it not?

A. No, I wouldn't say untreated. It is all treated, all that goes through the tank is treated, but forty per cent of the putrescible matter is still held in solution in the sewage.

Q. And that forty per cent of dissolved solids is putrescible, is it not? A. Yes.

Q. And it remains septic?

A. Remains septic probably when it leaves the tank, but not necessarily septic for a long period.

Q. Well, that is not what I am asking. I am asking if forty per cent of the total sewage that goes through the tank doesn't come out of the tank in a putrescible condition?

A. Your question is a little ambiguous.

Q. Well, tell me how it is ambiguous.

(The preceding question was read.)

A. All of the sewage that goes in the plant comes out except the solid matter.

The Court: The question is does it come out in such a way that putrefaction is going on when it comes out?

A. The Imhoff tanks properly operated take care of sixty per cent of the putrescible matter.

Q. Yes; now, isn't it a necessary complement of that statement that forty per cent comes out of the tank putrescible?

A. Forty per cent of the solid matter is still held in suspension.

Q. Well, is it putrescible? A. Yes.

Q. It is. Now, that would be 40,000 gallons a day that might possibly come out of the Imhoff tank putrescible?

A. When the city is thoroughly connected up.

Q. Yes. Now, what I asked you a few minutes ago was this: If that 40,000 gallons of putrescible sewage matter flowing out of the Imhoff tank into Town Creek is not more sewage than flowed through the old Cameron septic tank?

115 A. It may be a larger volume.

Q. Larger volume?

A. That is mere guess work on my part or yours either.

Q. Well, what is your opinion?

A. My opinion is that the uptown district, which was served by the old Cameron tank carried a much larger volume of sewage per connection than the city at large will carry for the reason that it served the uptown section. It had public toilets in the Court House and the public used those toilets. The public used the hotels.

Q. Now, you said there were about forty or fifty connections up there?

A. Yes; public connections get more sewage than a private house connection, a great deal.

Q. Yes, and you say there are 500 houses in the City?

A. But there is quite a lot of difference between one connection and another.

Q. I understand, but the old tank cared for about ten per cent of the connections which are possible under the present plant?

A. I don't think there will ever be over 350 connections. That is my estimate.

Q. Well, 500 are possible, aren't they?

A. Theoretically, yes; practically, no.

Q. You don't know how many there are today, do you?

A. I know how many there were recently, 275.

Q. Well, now, you wouldn't say that the old septic tank cared for more sewage than the present Imhoff tank ejects into Town Creek, will you?

A. I wouldn't say it did because I don't know.

The effect of closing the valve on one of the settling chambers would be to shorten the period of retention of the sewage through this tank. That was recommended by the State Board of Health after the plant was installed. In the other chamber you would have simply the water from which the solids had settled out in the sludge basin. The gas vent which you show me in the picture of the tank looks as if it had been slightly neglected. Of course whenever the sludge in
116 the settling chamber reaches the point about 18 inches below the sloping walls of the center compartment, gas arising therefrom would come up through the two outside chambers, the settling chambers, but the sludge at that time is supposed to be removed from the tank. The line to which you point in the pictures might indicate gas or one of a number of other things.

No, sir, we did not seal the by-pass after we were through with the construction. We never do. I know the State of Kansas does permit a by-pass, because we have built a lot of such plants.

117 They do not have to be sealed because I have been with the engineers and made final inspections and they were not sealed. The one we last finished was at Kiowa. I do not recall any others. Of course, this by-pass has a valve which is kept closed, but which can be opened by the operator in which event raw sewage will go around the tank. Oh, yes, we could have disposed of drainage during the construction period by having a pit there and putting in a pump and pumping it as fast as it accumulated. To have handled it by natural flow through a trench would have required a pretty deep trench. It could have been done but the trench wouldn't have stood up. It would have had to have been braced.

Q. Well, you just needed it during construction days, didn't you?

A. Oh, no, you may need a by-pass any time.

Q. For what purpose?

A. For working on the disposal plant.

Q. And for the purpose of passing the raw sewage and all of it around the plant?

A. If you need to do that, the by-pass could be used for that purpose.

Q. Well, now, so far as construction itself was concerned, you didn't absolutely need a by-pass, did you?

A. It was the least expensive way of handling it, good construction to put it in.

Q. Well, you have in mind naturally, since you are going to have one ultimately, you will use it for construction purposes, too, but for construction purposes alone, no by-pass is necessary, is it?

A. Not absolutely.

Q. Now, Mr. Rollins, you stated yesterday that the water in Town Creek above the Imhoff tank outlet is polluted, but you stated that you had not made any tests and I understand that you gave that opinion on observation?

A. My personal opinion was based [—] observation only.

Q. Would you stake your professional reputation on that opinion? A. I am not a chemist.

Q. You are not a chemist? A. No, sir.

Q. You wouldn't give a professional opinion that that water in Town Creek above the Imhoff tank outlet is polluted, would you?

A. Well, I have seen the results of some tests that were made on it and the tests indicate it.

118 Q. Well, I am speaking of your own personal professional opinion?

A. What was your question?

Q. I am asking you if you would give your own professional opinion that the water in Town Creek above the Imhoff tank outlet is polluted?

Judge Glenn: Your Honor, I think that is unfair to the witness. The witness is under oath, and as to his professional reputation and substantiating his oath, I do not think it is fair.

The Court: I understood the witness to say that on his own observation the water was polluted.

Mr. Hazard: Yes. Now I am trying to test that.

The Court: Of that that is, whatever judgment he has, you have got that opinion from the witness.

By Mr. Hazard:

Q. Would you give an opinion from observation that water is not polluted?

A. I based the statement that I made on a comparison of other similar streams.

Q. Well, that is not my question. I asked you if you would give an opinion from observation that water is not polluted?

A. Most branch water is polluted.

Q. Mr. Rollins, we would get along a lot faster if you would answer my question. Now, you know what it is.

A. I said most branch water is polluted.

The Court: The question is, Mr. Rollins, from observing any stream, whether you would be able to say whether it is polluted or not?

A. Not in every case because some clear water will contain pollution; water that may look perfectly pure may contain harmful bacteria and be harmful both to stock and to persons, might be perfectly clear.

Q. Isn't it a fact, Mr. Rollins, that you can't determine whether water is good or bad by looking at it?

A. You can't tell what harmful bacteria it may contain by looking at it, no.

Q. And you can't tell by looking at water whether it is fit to drink, can you?

A. Well, that is just what I said. You can't tell.

119 Q. Now, did you ever see raw sewage going through the by-pass? A. No, sir.

Q. How many times have you inspected that plant since you built it?

A. Oh, I have perhaps been there a dozen times since the plant was completed.

Q. When was the last time you were there?

A. I believe the last time I was there was about a year ago in April, something like that, about April or May, 1929.

Q. You haven't been there in the last year?

A. In Harrisonville a good many times, but I didn't make an inspection of the disposal plant.

Q. Now, you said yesterday that oxidation was about the only method of disposing of sewage. What other method is there? A. You mean to hasten oxidation of sewage?

Q. Well, yes, to reduce sewage to a stable condition.

A. Well, it could be chlorinated; that aids.

Q. Can be what? A. The effluent can be chlorinated.

Q. What is the chemical process that goes on with chlorination of sewage?

A. Well, the chlorine is simply applied to either the raw sewage or the settled sewage.

Q. What other methods are there then?

A. Well, sewage may be filtered by sprinkling or by contact filters. That hastens oxidation, aids oxidation.

Q. Well, then, that is an oxidation method?

A. Certainly.

Q. The chlorine simply breaks down the sewage and hastens the oxidation, doesn't it?

A. That is what I understand. I am not a chemist, I don't know the exact reaction that takes place.

Q. Now, what other method is there for reducing sewage?
A. Well, there is activated sludge processes, that is an oxidation process.
Q. Are you familiar with the fish pond method?
A. No, sir, never used it.
Q. Do you know about it?
A. Don't know anything about it.
Q. Don't you know that it was the great method in Europe and Germany for years?
A. I think I have read somewhat about it, but never
120 read the way it is used, or with a view of using it.
Q. What are the two stages in the reduction of sewage?
A. Well, one is what is called reducing the amitosis and the other, the mitosis.
Q. Well, now, what action goes on in the first stage?
A. Well, when the first stage is performed, in the absence of air and light certain bacteria perform certain functions; the second functions are performed with the aid of air and light. Those are the two stages.
Q. Those are the two stages, are they?
A. Those are the two stages for reducing the bacteria.
Q. And the first one has to go on, you say, in the absence—
A. (Interrupting) In the absence of air and light, and the second one with the aid of air and light.
Q. Well, now, Mr. Rollins, isn't it a fact that the first stage is called fermentation?
A. That is just another name for the action of the amitosis.
Q. Just another name for it?
A. That is what the amitotic stage is, fermentation stage.
Q. Now, assuming that you are right, what substances are treated or disposed of in that first stage?
A. Well, I don't know that I can say just what substances are disposed of.
Q. Don't you know that in the fermentation stage the carbonaceous matter is oxidized?
A. I know it is an oxidation process.
Q. I know, but I am speaking now of some subdivisions of the treatment of sewage. Do you know that in that first fermentation stage the carbonaceous matter is oxidized?
A. I stated a while ago I wasn't a chemist.
Q. Don't you have to know something about these things in order to treat sewage?
A. Yes, sir, you have to know a great deal about them. You don't have to be a chemist, though.

Q. Well, don't you have to know something about the chemistry of sewage disposal?

A. Yes, you have to know something about it.

Q. But you don't know that the carbonaceous matter is oxidized?

121 A. I think I have read that twenty-five or thirty years ago when I was in school. I don't know that I could have recalled it unless you had refreshed my memory.

Q. And you haven't had occasion to use that?

A. I think I read it a long time ago.

Q. Didn't you say you had put in more sewage plants than anyone except one engineer in the State of Missouri?

A. No, sir, I did not.

Q. How many have you built in the State of Missouri?

A. I said we had built more municipal plants.

Q. How many sewage plants?

A. But not so many sewage plants. I think we have built as many sewage plants as anyone else.

Q. Don't you know that the second stage is the putrefaction stage? A. I think that is correct.

Q. And do you know what substances are disposed of in the second stage?

A. No, you would have to refresh my memory again.

Q. You don't remember that the nitrogenous organic matter is disposed of by oxidation in the second stage?

A. That is immaterial to me.

Q. Now, do you know which one of these stages goes on in an Imhoff tank? A. The fermentation stage.

Q. How is that?

A. The solids are settled out in the Imhoff tank.

Q. Oh, yes; that is mechanical, isn't it? You could do that with screens or any other of several methods?

A. Oh, no.

Q. Well, now, what is the chemical process? Which of these two stages goes on in the Imhoff tank?

A. The solids are settled out, digested in the sludge chamber, and later removed.

Q. Now, I am speaking of whether it is fermentation or putrefaction that goes on in the Imhoff tank.

A. Well, it is putrefaction.

Q. Well, has the fermentation already occurred?

A. Why, it might in some cases occur before the sewage reaches the plant.

122 Q. Well, would there be any fermentation in the Imhoff tank at all?

A. Septic action would take place anywhere along the trunk line or in the plant.

Q. Now, is septic action fermentation or putrefaction?
A. Septic action is fermentation.
Q. And it is not putrefaction?
A. Well, it may be a little of both.
Q. Do you know what gases are given off in the fermentation stage? A. No.
Q. How about hydrogen sulphide?
A. Always present in sewage.
Q. How about carbon dioxide?
A. I think that is another one.
Q. Ammonia? A. In most sewage.
Q. In most sewage?
A. Most sewage contains a certain amount of ammonia.
Q. Well, I am speaking now of the fermentation stage. Do you know whether there is any ammonia gas given off in that stage?
A. All gases are given off in the fermentation stage.
Q. All gases?
A. A percentage of them in the fermentation stage.
Q. You mean all the gases there are?
A. No, I don't know that all of them, but most of them.
Q. How about methane?
A. Well, I couldn't tell you about that. I am not a chemist.
Q. Well, do you realize that all of these things are involved in the disposal of sewage, don't you?
A. They may be; not particularly in the design of a sewage disposal plant, though.
Q. Now, you spoke of this amitotic action. You say that occurs in the absence of light? A. That is what I said.
Q. Does oxygen have anything to do with that?
A. Yes.
Q. What does it have to do with it?
A. Oxygen is combined with the matter in the sewage to help break it down.
Q. No, there is an oxidizing effect going on in the plant which helps to reduce the putrescible matter.

Q. Why, Mr. Rollins, don't you know that the amitotic action is the action of bacteria in the absence of dissolved oxygen?
123

A. There is always oxygen in water.
Q. In water, yes, but how about in sewage?
A. All sewage is ninety-five per cent water.
Q. Well, now, Mr. Rollins, you made some tests in this creek below the Imhoff tank outlet and you found there wasn't any dissolved oxygen in there at all. Would you say those tests were wrong?

Mr. Barnett: Of course you misspoke yourself when you said Mr. Rollins made these tests.

By Mr. Hazard:

Q. I meant to say they made some tests. There were some tests in evidence. You were in the court room. You heard the testimony of Mr. Black in which he said there was no dissolved oxygen in the creek below the outlet?

A. The dissolved oxygen had been used up in oxidizing the sewage that was carried into the water.

Q. But you said a minute ago that there was always oxygen.

A. Well, that is dissolved oxygen, that is free oxygen, surface oxygen.

Q. How is that?

A. Oxygen that may still be used for oxidizing purposes on sewage or any other foreign matter.

Q. Well, is dissolved oxygen anything except oxygen in water?

Mr. Barnett: It seems to me there is a good deal of repetition about this, taking a good deal of time on one witness.

The Court: Can't you have a chemist tell you about these things? This man says he is not a chemist. A chemist can tell us all about these things.

Mr. Hazard: Very well."

124 This location was selected for the tank because it appeared in our studies to be the most feasible location, counting gravity of flow of the sewage for the greater portion of the town, the necessary cuts, the elimination of a line station for public sewage and other features that had to do with the design. It was a convenient place to enter the creek. The ground was available, we could purchase it without going into a law suit to get it and the creek made a bend there that brought it over close to the right-of-way.

Cross-Examination

By Mr. Donaldson:

In 1923 I was acting as engineer for the City of Harrisonville in the design and construction of the plant and as such engineer selected the location of the outlet and made demand upon the Missouri Pacific for the purpose of crossing their right of way at the order of the city officials. The Missouri Pacific Railroad Company did nothing whatever

125 in the construction, or since in the operation or maintenance of the tank.

Redirect Examination

All of the sewer system we designed that passes through the Imhoff tank lies within the natural water shed of Town Creek and this sewer system is required for the purposes of the general health and public sanitation of the City of Harrisonville.

Even with secondary treatment supplementary to the Imhoff tank it is not likely that the effluent would be entirely free of putrescible matter. The secondary treatment ordinarily removes twenty to thirty or thirty-five per cent of the putrescible matter. In some extreme cases, some ideal cases, it might remove it all, but in most cases about ninety per cent would be the total of the putrescible matter removed by the combined action of the Imhoff tank and secondary treatment. I never saw the effluent collected in the trough after flowing over the weir at the end of the Imhoff tank of any such dark color as shown in Exhibits 5 and 6. It is clear with a slightly grayish tinge to it. Placed in a bottle it is almost transparent.

At the plant there is usually a slight odor. The distance from the plant at which you get the odor depends upon the direction of the wind and the state of the atmosphere as to whether these odors may arise. If there happens to be humidity in the atmosphere so that the odors do not rise, and as the wind carried it in some certain direction, you may detect it a hundred yards away. In other cases, you might be within twenty-five feet of it before you could detect any odor. The Imhoff tank is entirely open with no cover over the top. All secondary treatments that I have observed increase the odors emanating from the plant over those that do emanate from merely primary treatment. In the secondary treatment the sewage is in liquid form and in a sprinkle, and naturally the sewage in fine particles is more exposed to the air and the oxidizing effect than in falling on the broken stone and which of course is filled with air prior to the dosing of the sewage. This oxidation period is one of the sources from which noxious odors arise. There may also be some during the primary settling periods. If any secondary process were added to this Imhoff tank it would increase the disagreeable odors given off by the plant. Defendant's Exhibit C is the document which I received as engineer for
126 the City of Harrisonville from the State Board of Health of Missouri at the time of undertaking the construction of this sewer system.

Defendant's Exhibit "C"

"State Board of Health of Missouri, Division on Sanitary Engineering.

Report on Sewerage Conditions in Harrisonville, January 5, 1923.

Harrisonville is the County Seat of Cass County, having a population of 2073 (1920) census). It covers an area of about one and one-third square miles, about one-third of which is built upon. The topography is rolling with a portion of the town built on the crest of a low ridge.

A field investigation of sewerage conditions in Harrisonville was undertaken on request of City authorities. It was found that there were over one hundred private sewerage systems in operation in the city serving residences and private houses. The balance of its homes are served by privies.

The field survey showed that the city of Harrisonville should immediately undertake the construction of a municipal sewerage system.

A municipal system of sanitary sewers is much more economical and satisfactory than the further general installation of private system of sewage disposal by the residents. The experience of hundreds of towns of one to three thousand population has proven this. They have found it desirable from an economic standpoint to install a municipal sewerage system even though a great many private systems already existed. The immediate installation of a municipal system will save the investment of additional money in constructing new private systems and improving old ones. Any such investment would be largely wasted when a municipal system is installed, as eventually is always done.

Not only is the cost per individual for a private sewerage system considerably greater than the proportionate cost for a municipal system, but also the expense of maintenance and operation is greater. A municipal sewerage disposal plant can be cared for at a small fraction of the amount which is, or should be, spent to insure the sanitary operation of private systems of sewage disposal.

Added to these economic arguments, an even more important consideration is the positive benefit to public health which will result from the installation of a municipal sewerage system in Harrisonville. Data accumulated from inspections and various sources reveals the surprising fact that

all but a few of the private sewerage systems are so installed and operated that they are a menace to the health of the community. This is due to the fact that most of the cesspools overflow at times, and that in other cases the sewage or septic fluid is discharged openly upon the surface of the ground. These practises are a violation of the regulations of the State Board of Health, adopted to protect the people against the transmission of communicable diseases.

It should be understood that even the clear effluent of a septic tank is likely to contain disease germs, since it has been found, for example, that typhoid bacteria will live in septic fluid for a period of ten days. The discharge of either the septic fluid or raw sewage upon the ground surface consequently constitutes a real menace to health. Flies serve as agents for the transmission of disease germs from the point of discharge to food in stores and homes. Domestic animals serve to carry these discharges to persons fondling them, and it is often found that children come in direct contact with the discharges when playing near such outlets. Many epidemics of filth borne diseases have occurred as a result of the existence of just such insanitary conditions.

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One solution to these insanitary conditions would be the improvement of all private sewerage systems so that no sewage or septic fluid was discharged upon the surface of the ground. This would be extremely difficult in many instances and would mean greatly increasing the investment in private systems which money would be largely wasted when the municipal sewerage system is installed. The discharge or overflowing of sewage or septic fluid upon the ground within the city constitutes a nuisance, since as pointed out, it is a positive menace to health. Authorities can order these nuisances abated, and if these orders are not carried out by the owner, may have them abated at the owner's expense. In case a municipal sewerage system is not designed, such action would certainly be appropriate and desirable in view of the menace involved and the numbers of complaints received regarding these nuisances.

However, the only permanent and economical method of remedying these conditions is the construction of a municipal sewerage system.

Summary.

The field survey showed that the existing sewerage conditions in Harrisonville were very unsatisfactory from a sani-

tary point of view, due to the fact that most of the cesspools overflow at times and that sewage and septic fluid is discharged opening on the ground surface in a large number of instances, thus endangering the public health. The construction of a municipal sewerage system to permit the elimination of these insanitary conditions is strongly recommended.

GEORGE W. PUTNAM,
State Sanitary Engineer.

Approved
Cortex F. Enloe, M. D.
State Health Commissioner."

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128 Recross Examination

The black substance in the bottom of Exhibit 5 looks to me like decayed vegetable matter, but this is based upon appearance only and I can't say what it is. I can't tell you whether a similar substance is found in the bottom of a septic tank or not. Yes, sir, our plant at Unionville is operating satisfactorily, but I wouldn't say that all of the putrescible matter was out. The effluent from that plant produces a slight odor in the stream. There have been odors there when I have seen it. It is possible there may not have been any at the time that Mr. Johnson saw it. If Harrisonville had a secondary treatment the condition in the stream would be improved and the pollution and noxious odors would not be sufficient to be objectionable.

When I saw the stream last, about a year ago, there was pollution both above and below the outlet that appeared to be septic. The water above the sewer outlet was running in a good deal smaller quantity because the effluent from the tank probably constituted a considerable percentage of the total flow below the outlet. Below there were evidences of cattle standing in the stream where there were none above. When cattle stand in streams the water becomes somewhat polluted. These banks were full of tracks of cattle, where they were in these pools, that crossed the banks back and forth. This was below the outlet. There was more evidences below the outlet of the grayish stringy matter appearing in plaintiff's Exhibit 5.

I do not say that there is a 100,000 gallons a day going into this stream from the Imhoff tank. That is the capacity of the tank when the city is fully connected up, its ultimate capacity. From my observation the stream is polluted both above and below the outlet with a larger percentage of pollu-

tion below. But at the time I observed it there didn't seem to be sufficient pollution to be objectionable. I have seen a number of other streams which indicated as much pollution where no objection was ever raised. I do not consider the pollution above this outlet objectionable for the use of cattle, nor below the outlet either. The cattle were using the water of the stream below. I never have seen the stream when there was any large difference above and below the
129 outlet. I have seen the disposal plant some ten or twelve times altogether. I wouldn't be positive that I have gone to the creek that many times. I observed the disposal plant that many times and I usually step over to the creek, over to the Town Branch, go down the branch for a hundred yards or so and take a look at it. Yes, sir, I have seen the creek more than five times.

C. V. Lynch.

C. V. Lynch, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I am City Clerk of the City of Harrisonville and have charge of the records of that city's funds and assessments and tax books, and I have with me a statement compiled of those different funds. This was compiled by the requirement of an ordinance of the City of Harrisonville. The last one was made June 2nd.

"Mr. Hazard: (Counsel for plaintiff): If your Honor please, we object to this evidence as not a proper matter of defense. There are several methods by which the City may build a sewage system or a disposal plant. It is not confined to its power to borrow money.

The Court: Let's get at the point here. Are you trying to show the city of Harrisonville is poor?

Mr. Barnett: Yes, sir, not only poor but that it may not, within the limits of the law, by the sale of additional bonds get the money to build this secondary plant. Our purpose in this testimony is to show the Court what the financial condition is of the City. Of course, whether or not the City can or cannot create greater indebtedness after that is a question of law, regulated by the Constitution and the statutes, but this is to give the Court the facts about our present financial condition.

The Court: Now, is it your statement that the City could encroach unreasonably upon the land of a property owner

and then defend its conduct, justify it, upon the ground that it was not financially able to do a reasonable thing?

Judge Glenn: No, your Honor, it is not.

The Court: In other words, that a poor town could do an unreasonable thing and a rich town could not.

Judge Glenn: We do not take that position, but
130 this: If it is possible for this Court to make an order for us to put an additional plant in there, this Court would have to take into consideration the fact that—whether we have exceeded our constitutional limit of indebtedness before the Court could force us to do it; in other words, if the Court could force us to do something the Constitution said we couldn't. But as to the damage we have done, the party can sue us and get a judgment and the Court can cause a levy in addition to a constitutional limit, but the City can't vote a bonded indebtedness.

The Court: I understand the theory that you can pay damages, but you can't arrange to prevent damages, is that it?

Judge Glenn: This other way, we would have to vote bonds to do this, and we have exceeded our constitutional limit,—that is, we haven't exceeded it, but we have already bonded the City to the maximum.

The Witness: Section 12 gives five per cent for building sewers. We have now under that five per cent some $42,-500.00.

The Court: Now, for the purpose of this case, couldn't there be an agreement entered into so as to avoid all of this testimony, subject to your objection, as to what the value of the City is, what its assets amount to, and that it has reached the maximum of its bonded indebtedness, all subject to your objection, that is material here, so we can have it, and it will cut out a great deal of testimony.

Mr. Winger: I didn't quite get the Court's suggestion.

The Court: Couldn't it be agreed that that is the fact, that the City has reached the limit of its bonded indebtedness, subject to the objection, to the end that that matter might be submitted?

Mr. Winger: We do not think it makes any difference, but if it is a fact there is no use putting in a lot of time proving it. If these gentlemen say to me, as brother lawyers, it is a fact, I see no necessity of taking a lot of time of the

Court to prove it, and it might be admitted that the bonded indebtedness limit has been reached, but we object to that as an immaterial matter.

Mr. Barnett: I do not want to be misunderstood in
131 that matter, and I am sure co-counsel doesn't either. We believe this involves a question of law, and we believe that, under the Constitution and the Statutes, we have reached the limit of our bonded indebtedness so far as the construction of any additional sewerage plant is concerned, but I do not want these gentlemen to come to me and say "We have investigated the law and we have a different view about the thing". We are giving them our opinion as lawyers about it, and let me say this, if the Court please: These gentlemen say that we can build an additional system there and both for the purpose of measuring the City's power to issue additional bonds for that purpose, and also for the purpose of informing the Court about our financial condition,—those are all things which the Court would naturally take into consideration in that matter; of course we do not concede that there is any jurisdiction in the Court to make an order of that character, but that since these gentlemen have presented that issue, should the Court, in the outcome of the case, believe with them that there is such jurisdiction, then the Court should have this additional information to know whether or not it can be done by the City lawfully.

The Court: Make your objections on the ground it is immaterial, and let's go on with this case.

Mr. Hazard: We object to this evidence on the ground it is irrelevant and immaterial for the reason that the City, under the Laws of 1929, Page 319, has the power to build a sewage disposal plant by general contract, payable out of its general revenues over a ten year period without resort to its bonding power; that the City also has power, under the statutes, to build a sewage disposal plant by a special assessment without resort to its bonding power.

The Court: Now, then, subject to the objection, I will admit this testimony. Then I can look into it. You may proceed. I am not going to rule on the objection. I will admit the testimony and rule on the objection later."

The Witness continuing: I have the assessed valuation of
the City of Harrisonville made on June 1, 1927, to-wit:
132 $1,101,672.00. The valuation made on June 1, 1928 is $1,224,118.00 The 1929 assessment has not been ap-

proved by the Board of Equalization of the State of Missouri and I know nothing about it, and it hasn't been certified to me by the County Clerk.

The bonded indebtedness of the City of Harrisonville at the present time is,

Sewer bonds	—	$39,000.00
Water works bonds	—	100,000.00
Other bonds outstanding against the current revenue	—	3,500.00

The other liabilities of the city will amount to on

Water works construction	—	$3,066.44
Accounts payable	—	11,258.59
May salaries that have not been paid	—	881.40
Accrued interest on water bonds	—	1,687.50
Accrued interest on sewer bonds	—	681.66

That is all except the overdraft on the light general and water general. The overdraft on the light general fund is $2,378.56, and the water general fund $458.42.

To pay this indebtedness the city has in view delinquent

Real estate taxes	—	$2,948.64
Delinquent personal taxes	—	2,319.47
Delinquent oiling taxes	—	1,475.99
Delinquent merchants' taxes	—	353.44
Total		$8,097.54

From experience I would say that the City will not collect over 50% of the delinquent taxes, that is a liberal estimate. On hand the City has the following amount:

General fund	—	$358.77
Fire equipment fund	—	425.23
Sewer fund	—	4,897.33
Water works bond fund	—	2,466.17
Electric light guarantee fund	—	75.00
Water guarantee fund	—	382.50

The sewer fund and water works bond fund, will be practically dissipated on July 15th and August 1st, to take up the interest due at that time. The electric light general fund, according to the treasurer's report, had $1,362.71, and the water general fund was overdrawn $21.72, leaving a balance out of these funds of $9,945.99. The report in question, defendant's Exhibit "D", was then offered in evidence by defendant and received by the Court subject to the objection last made by the plaintiff.

133 Defendant's Exhibit "D"

1928
valuations of taxable property in Harrisonville, Mo.

Real Estate	$ 790,390.00	
Personal & Merchants	311,282.00	
Total		$1,101,672.00
1929 Valuations.		
Real Estate	$ 891,880.00	
Personal & Merchants	332,238.00	
Total		$1,224,118.00
		2,325,790.00

Minutes of the Board of Aldermen, Oct. 5th, 1923 show report of the consulting Engineers, recommending acceptance and final payment due contractors for construction of the sewer system in Harrisonville.

Financial Statement # 62 of The City of Harrisonville, Mo., as of June 2nd, 1930.

Assets.

Real Estate			$ 3,286.00
Fire & street Equipment			8,663.32
Light plant			24,997.70
Water plant			111,266.97
Delinquent Real estate taxes		$ 2,948.64	
Delinquent Personal taxes		3,319.47	
Delinquent oiling taxes		1,475.99	
Delinquent Merchants taxes		353.44	
			8,097.54
Treasurers acct	Genl Fund	$ 358.77	
" "	Fire Equip Fund	425.23	
" "	Sewer Fund	4,897.33	
" "	Water Wks Bond	" 2,466.17	
" "	Elec Lite Gt	" 75.00	
" "	Water Gt Fund	382.50	
" "	Elec Lite Genl	" 1,362.71	
" "	Water Genl Fund (overdrawn)	21.72	
			9,945.99
			$166,257.52

Liabilities.

Sewer Bonds outstanding	39,000.00
Water Works Bonds Outstanding	100,000.00
Bonds outstanding on current revenue	3,500.00
Bal due on water works construction	3,066.44
Accounts payable, wholesale	11,258.59
Salaries for May	881.40
Accrued interest on Water bonds	1,687.50

Accrued interest on Sewer Bonds	681.66	
Street Lights & Flush tank water	631.43	
Overdraft on Electric Light General Fund	2,378.56	
Overdraft on water general fund	458.42	
	163,544.00	
Assets in excess of liabilities to Balance	2,713.52	$166,257.52

134 Tabulated statement of receipts and disbursements of the City of Harrisonville, Mo., for the period ending June 2nd, 1930

To			
General Fund Receipts.			
Balance on hand May 5th, 1930		$ 185.12	
Cash Currents & delinquent taxes, real, per. merc.		52.65	
" Occupation taxes		52.00	
" Auto taxes		69.00	
Total cash receipts Genl fund		358.77	
General Fund Disbursements.			
By F. E. Cummings salary	$ 25.00		
" J. T. Honley "	25.00		
" J. T. Honley commission on collections	11.00		
" J. T. Honley killing 9 dogs	9.00		
Davis Bros Garage May acct	8.60		
Cass County Democrat, Memorial Day Proc	2.00		
Collins & Shepherd, May Charity Acct	17.12		
Miller & Collup, May account	10.00		
Will Clemments, May account	1.25		
L. E. Peck Motor Company, May acct	1.11		
Secton Ptg Company, May acct	7.20		
Indept Oil & Gas Company, May acct	18.48		
Cable & Collup, May account	2.30		
George C. Carter, May account	.32		
J. R. Ewing, orders paid on Mayors checks	232.00		
Total disbursements	370.54		
Disbursements over receipts overdraft		11.77	
	370.54	370.54	
Sewer Fund Receipts.			
To balance from April, on hand May 5th		4,844.68	
" cash received from taxes		52.65	
No Disbursements, Bal on hand June 2nd			$4,897.33

Fire Equipment Fund Receipts

To	Balance on hand May 5th		414.70	
"	cash received from taxes		10.53	
	Total Receipts		425.23	

Disbursements Fire Fund.

By	Hurley Lee Spicer Post #42	$37.50		
"	" " " " "	25.00		
"	Cable & Collup May account	8.24		
"	Cass County Telephone Co. May acct	3.50		
"	Davis Bros Garage May account	7.50		
"	J. C. Patrick, Rent for May	25.00		
	Total Disbursements	106.74	106.74	
	Balance on hand Fire Department June 2nd			318.49

Water Works Bond Fund Receipts.

To	balance on hand May 5th		2,424.05	
"	cash received from taxes		42.12	2,466.17

No Disbursements, Balance on hand June 2nd.

Water General Fund Receipts

To	balance on hand May 5th		000.00	
"	cash received from sale of water in May		830.18	

Disbursements.

By	overdraft from April 7th	$851.90		
"	Cleo Brown salary ½ May salary	50.00		
"	Eugene Callaway 1/3 May salary	45.00		
"	L. F. Topliff 1/3 May salary	33.33		
"	M. G. Holloway, 1/3 May salary	50.00		
"	C. V. Lynch, 1/3 May salary	25.00		
"	J. T. Bennett, 1/3 June rent	10.00		
"	P. K. Glenn & Co. May acct	21.75		
"	Deacon Hardware Co., May account	17.02		
135 By	Cass County Telephone Co., 1/3 May acct	3.53		
"	W. G. Clumm & Son, Apr. & May acct	62.77		
"	C. V. Lynch freight & Express	16.15		
"	General Chemical Co. Mch & Apr accts	68.00		
"	Allen & Glenn, Insurance	31.13		
"	Ulrich Supply Company March acct.	3.02		
		$ 1,288.60		
	Disbursements over receipts overdraft		458.42	

Light General Fund, Receipts

To	Balance on hand May 5th	$ 000.00
"	cash received for current in May	3,027.03
	Total receipts	$ 3,027.03

Disbursements.

By	Overdraft from May 5th, 1930	1,669.32
"	Cleo Brown, 2/3 May salary	100.00
"	Eugene Callaway, 2/3 May salary	90.00
"	L. F. Topliff, 2/3 May salary	66.67
"	M. G. Holloway, 2/3 May salary	100.00
"	C. V. Lynch, 2/3 May salary	50.00
"	J. E. Scruggs, all May salary	175.00
"	Ted Duncan, 216 ½ hour labor in May	86.50
"	Urlyss Duncan, Extra labor in May.	9.80
	C. V. Lynch, freight & Express pd.	61.39
"	J. E. Connely, insurance	51.28
"	Opal Brookhart, insurance	29.00
"	Allen & Glenn, Insurance	29.00
"	Ivan E. Nelson, insurance	31.22
	Deacon Hdw Company May acct.	7.46
	Cass Co. Tel Co., June rent May acct	7.07
	Sexton Ptg Company, May acct.	3.50
	Acme Petroleum Co., April acct.	435.42
	Indepet Elec Machy Co., Bal Mch acct	36.75
	Ben D. Prater, part payment on acct	310.78
	Columbian Elec Co. Part Feb account	159.01
	English Bros. Mch Company, Bal acct to date	33.84
	Graybar Electric Co., part on acct.	8.66
	Allen & Glenn, insurance on power hse	62.27
	Line Material Company on Feb acct.	95.21
	Vacuum Oil Company, on account	125.04
	M. G. Holloway ½ interest in light line Sth St to Vandeventer residence	42.96
	A. V. Vandeventer, ½ interest in light line Sth St to Vandeventer Residence	42.96
	Fairbanks, Morse & Co., rental on Machy for May 1930	600.00
	J. R. Ewing, orders pd on Mayors cks	885.38
	Total Disbursements	5,405.59

Disbursements over receipts Overdraft....		2,378.56	
	5,405.59	5,405.59	

Electric Light Guarantee Fund Receipts

To balance on hand May 5th.....		60.00	
" cash received from consumers.....		15.00	
Total receipts.....		75.00	
Disbursements			
By refund to J. M. Garrett.....	$5.00	5.00	
Balance on hand June 2nd.....			$70.00

Water Guarantee Fund Receipts.

To Balance on hand May 5th.....		342.00	
" cash received from Depositors.....		39.00	
		381.00	

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Disbursements

By refund to J. C. Bridges.....	$1.50	1.50	
Bal on hand June 2nd.....		379.50	379.50
Total.....			$ 8,131.49

Recapitulation of the City Treasurers
Balance as of June 2nd, 1930.

General Fund.....		$ 000.00
Sewer Fund.....		4,897.33
Fire Department Fund.....		318.49
Water Works Bond Fund.....		2,466.17
Electric Light Guarantee Fund.....		70.00
Water Guarantee Fund.....		379.50
Total Funds.....		$ 8,131.49
Less Overdrafts.		
Electric Light General Fund.....	$2378.56	
Water General Fund.....	458.42	
General Fund.....	11.77	
	$2848.75	
Balance cash in all funds.....		$ 5,282.74

137 The witness continued: I have [—] around Harrisonville practically all my life, living on a farm part of the time and I am acquainted with Town Creek, which drains possibly sixty or seventy per cent of the town, that is the northeast part of Harrisonville and the north part and the west part. The remainder of the town drains into Muddy Creek. Prior to the construction of the sewer system the county sewer served the court house and I think the hotel and the jail and possibly some of the stores. It emptied into Town Creek. This creek runs close to the Oakland Cemetery. There is and for twenty years has been a slaughter pen on the banks of Town Creek and that has been in use practically all the time.

The rental value of pasture land in that community is from 3.00 to $5.00 per acre. The extreme north end of the Dickey land would be accessible for milk cows but the rest of it would not. They would have to cross two railroads, the Missouri Pacific and a branch of the Frisco, and the state highway No. 71 to get to the pasture. The rental value of the Dickey land west of the railroad is from $3.00 to $5.00 per acre per year upon the assumption that the water in that creek is in no wise injurious to cattle.

Cross-Examination

I am sure that the Court House and Jail were connected with the old septic tank, but I am not sure about the hotel. I never noticed any odor from the old septic tank, but I heard people complain about it. I never lived close to it and had no occasion to think about it. It is about a mile along the creek from the point where the old septic tank entered into the creek to the outlet of the present sewer system. During that distance the creek formerly ran through a little lake, which I think is now dried up. This Dickey land, a great distance south of the pasture now in controversy, was the old fair grounds on the east side of the track and used formerly for pasturing town cows. This creek does not run through that land. Some of the people in Harrisonville pay $2.00 or $2.50 per head per month for the pasturing of a town cow. Yes, sir, we have just completed a modern water plant in Harrisonville.

J. W. GEORGE called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

138 Direct Examination

I am a veterinarian and received my education at the Kansas City Veterinary College, have been in the practice

some twenty years in and around Harrisonville. I am acquainted with Town Creek and Muddy Creek and have been for that period. Prior to the construction of the new sewer system the county sewer discharged into that creek. I knew it served the Court House and the jail, but outside of that I don't know anything about it. Yes, sir, there is a cemetery on Town Creek before it gets to the Missouri Pacific tracks. It runs right along side of the cemetery, maybe within 200 feet of some of the graves. There is a slaughter pen on the creek that has been in use for the last twenty years, which drains into Town Creek.

Yes, sir, prior to the installing of the new city sewer there was sickness among the cattle down Town Creek. It was due to contaminated water and caused bowel trouble and diarrhea among the cattle and horses. The great trouble that I had at that time was on the Doc Elder pasture, which now belongs to Judge Bruce, and is just below Mr. Dickey's land. At that time I had no sickness among the cattle on the Dickey land. I don't think there were any cattle in it. I have treated the Dickey herd that runs on this pasture. They never at any time had any sickness down there that you could attribute to the water. I have been called in to the Dickey herd 100 times in general veterinarian practice to treat particular cases. Yes, sir I attended some of his cows for abortions, that is slipping of calves, but made no examination to see whether it was contagious abortion. I am not qualified to do that. It takes laboratory tests. These cases of abortion were not caused by the water. That has been since the installation of this septic tank. No, sir, I have never had any call down Town Creek on any case that I would attribute to the water since this Imhoff tank was installed. I have been along that stream both above and below that sewer outlet. As a vetrinary I would say that water would not be harmful to cattle even below the sewer outlet, and there are no more odors along that stream than there are along any other stream from decaying vegetation. When a person gets in the stream above the septic tank and wades around in it, it riles up from
139 below pretty black. Yes, sir. I have noticed the odors around the Imhoff tank, possibly 200 or 300 feet. I took some samples of this water with Mr. James, one of the attorneys for the defendant, City. One sample was sent to a pathological laboratory and the other to a chemist. There were five samples taken, I think. One at the outlet of the Imhoff tank where it enters the creek, one about twenty feet down the stream, one about fifty feet up the stream, one about

150 feet down the stream from the Imhoff tank and one about one-eighth of a mile. The samples were taken in pairs, two bottles in each place, sealed and marked and delivered to Mr. James.

Cross-Examination

Yes, sir, there was trouble with the cattle on Judge Bruce's place before he owned it and at a time before the Imhoff tank was built. We lost a few of the cattle, then I had the parties move them out of the pasture. I thought their condition was due to the bad water in the creek. It was low, a very poor water supply. I did not perform any autopsy on the cattle or make any tests to determine what the cause of the sickness was. I thought it was the water, because those that I moved out of th: e, when I put them on good water supply most of them straightened up and got all right. I have no way of knowing positively why some cattle died. The water at that time was contaminated from the creamer by running milk into this stream. Milk, you know, will putrefy and contaminate a stream quicker than anything else you can put in it because it is the greatest carrier of bacteria, if it isn't properly handled, of anything that we have. I am not a chemist and I made no tests of the water at that time. Yes, sir, I think the water on the plaintiff's land looks better at the present time than it did on Judge Bruce's place at that time. I don't think that there is the contamination that there was then.

I have been down to the Imhoff tank and watched the outflow from the tank. It is a kind of a bluish looking water. You might see the kind of deposits such as exist in the bottom of the plaintiff's Exhibit 5 in any creek. I have seen considerable quantities of the same thing in stagnant pools in Town Creek. I don't think it would injure cattle in any way to drink the water. Potability of water is a matter of chemistry and pathology, I think. No, sir, I am not a pathologist or a chemist, and have made no such tests of that water. I base my opinion upon the fact that it has never injured any cattle that I know of. There had not been any sickness down there in that pasture to my knowedge. There might have been cattle injured that I didn't know about. I live on the edge of Harrisonville, but I don't own any property in the city.

Redirect Examination

I am renting a pasture close to Harrisonville for approximately $3.00 an acre. Yes, sir, I am acquainted with the rental

values of pasture land in the neighborhood of Harrisonville. That is around $3.00 an acre and assumes that the water is good. This milk condenser that I spoke of was on Town Creek above the Dickey land.

Recross Examination

The creamery is not there now. The rental value for town cows around Harrisonville is $2.00 per head per month. It has been up as high as $3.00. That is the highest. That is not for the entire year, it is just for the grazing season. Usualy about six months. It takes about two and a half to three acres of pasture for one cow.

J. H. GRAY called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I reside in Harrisonville. I have lived in that part of the country all of my life and I am acquainted with the streams around there and have fished all around there, including Town Creek and Muddy Creek. I am familiar with the county sewer which served the Court House and all the public places around the square and discharged into Town Creek on the west. Town Creek cuts into the cemetery grounds and runs into what we know as Gulf Pond where there is a slaughter house. There are two slaughter houses, one is George Taylor's, located right down north of the filling station, and the other is Levy Smith's. One is down close to the cemetery, maybe 100 yards and the other half a quarter from the stream. George Taylor's is further south and runs right into that pond, Gulf Pond.

141 I was down Monday last and saw this stream and the plaintiff's pasture. The water above the sewer outlet is not much different from that below. Yes, along the creek you can smell a little odor. At about fifty or a hundred feet from the Imhoff tank you smell an odor. Last Sunday afternoon I was playing tennis and in swimming in the pond about one eighth of a mile away and noticed no odor at all from the tank. I haven't noticed any odor along the creek there, but I haven't been along there for about a year over on the west side of the railroad tracks.

Cross-Examination

I have been across the track to the place where the tank empties into the creek but not down the creek during the last

year. Yes, sir, I am a taxpayer in Harrisonville. I think they completed a new water plant there about six or eight months ago. It cost, I think, $100,000.00.

C. V. LYNCH

C. V. Lynch witness for defendant, City, being recalled testified as follows:

Direct Examination

By Judge Glenn:

"Q. State whether or not the City of Harrisonville has levied the full amount they are authorized under the Constitution for the general fund.

Mr. Hazard: That is objected to for this reason: It is no matter of defense because it assumes that the City of Harrisonville has the right to spend its general revenue for some other purpose rather than the construction of a proper disposal plant.

The Court: I do not know what the object is. I will admit it subject to the objection and deal with it hereafter.

Mr. Winger: I think the question as stated calls for a conclusion.

The Court: Yes, that would call for a conclusion because I assume that the facts would have to be detailed and then if you have the law, the law would say whether or not they had reached the limit.

142 By Judge Glenn:

Q. State the amount as levied for general purposes.

A. The last two years they have levied at the rate of fifty cents on the hundred for general purposes.

Q. The general fund, has that been used each month?

A. Yes, sir.

Q. Practically all of it has been consumed for the general expense of the City. A. Every month, yes, sir.

The Court: Fifty cents to the hundred, is that the maximum under the law?

Judge Glenn: Yes, sir, Section 11, Article 10, under the Constitution, and your Honor, we want to show that under that section referred to this morning, it says this additional septic tank could be built by permission of the council, out of the general fund, but we want to show there is no general fund from which to do this work. I believe that is all.

Cross-Eaxination

By Mr. Hazard:

Q. Do you know the method of valuation of property for tax levy in Harrisonville? A. Yes, sir.

Q. What is it? A. The method of valuation?

Q. Yes, is the property appraised at its full value?

A. The assessor makes a valuation.

Q. You don't know whether that is the full valuation or not?

A. I couldn't say whether that is the full valuation or not. The assessor makes the full valuation.

Q. That is the city assessor?

A. They have no city assessor. It is copied from the township assessor's books.

The Court: I understood the statute or the Constitution requires the property should be valued at its actual cash value, is that correct?

Mr. Hazard: Yes, sir.

Judge Glenn: And, of course, the assumption is the officers did their duty.

The Court: Regardless of the facts.

Judge Glenn: The County Clerk certifies to the City Clerk the tax books, does he not? A. Yes, sir.

Judge Glenn: The Assessments? A. Yes, sir.

143 Judge Glenn: That is all.

(Witness excused)

S. J. Hamilton called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I now live and have lived in Harrisonville about twenty-three years. I am engaged in farming at the present time, but was in the hotel business a good many years at Harrisonville. I was in the hotel business in Harrisonville though about eight years prior to 1925. At that time the city had a water supply from a lake up in the northeast part of town called Lake Luna. The water was used on the lawns and in the barber shops.

"Q. Did you have a connection with that in the hotel?
A. No, we didn't use it in the hotel. Well, I mean we didn't use it in the bath part of the hotel.
Q. Well, what I am getting at, did anybody use that water for drinking purposes?
A. Oh, I don't think so, no sir.
Q. Was it considered fit for human consumption?
A. Well, we never considered it so. We never used it at the hotel.
Q. Did the water have any odor about it?
A. Yes, sir, there was some odor."

I am familiar with Town Creek running through plaintiff's land. I live just above and I cross it every day or two, but I have only been down to the tank one time. My residence is three-quarters of a mile north and east from the tank. We never get any smell from the tank at our residence. I have been down to the tank and have detected a slight odor where the effluent ran out of the tank into Town Creek. I had to be right up to the creek to smell it.

I am familiar with the plaintiff's land. I have bought and sold farm lands in that vicinity and own real estate in that vicinity and have been trading in farm land and I think I am familiar with the values of farm land as they were in 1923. Sixty dollars an acre I would say was the reasonable market value of the plaintiff's land west of the Missouri-Pacific tracks and the present value I would say was about the same.

144 Q. Just tell the court what, in your opinion, was the reasonable market value of this 150 acres of land belonging to the plaintiff and lying west of the Missouri Pacific Railroad in the year 1923.

Mr. Hazard: Just a minute, please. We object to that for the reason—

The Court: In the premise that it is not the issue here in this proceeding?

Mr. Hazard: Yes.

The Court: We are not trying an issue for a condemnation. The plaintiff has no right to recover here on that.

Mr. James: Our theory is we are entitled to show the reasonable market value of this land as of the date when this tank was constructed and now for the reason there might be a situation here where damages claimed and attempted to

be proven by the plaintiff would exceed the entire value of the land.

The Court: Well, upon that theory it might be competent, but not upon the theory of damages.

Mr. James: That is the theory, if your Honor please, on which we are offering it.

Mr. Hazard: It seems to me the defendant must rebut whatever evidence of damage is put in which is evidence going to the same character of damage.

The Court: I think if you are proposing to show the damages claimed should not be the same as they are, if that is the objection you can rebut that. I can see where it would be competent for that reason. The objection will be overruled."

Sixty dollars an acre I would say was the reasonable market value of the plaintiff's land west of the Missouri-Pacific tracks and the present value I would say was about
145 the same.

Yes, sir, I am taking into consideration that some permanent roads have been constructed down there since 1923. Land generally isn't as high as it was in 1923, but I think the improvements in the way of the roads in that particular place would make it about the same, would even up for the general decrease of farm values.

I was over this land since the tank was installed, just a few weeks ago. The cattle graze along this stream and up around the outlet of the tank eat the grass. I have seen them there.

Cross-Examination

We used the Lake Luna water as running water in the baths, but for drinking water we had a big cistern right at the door. At times the water didn't smell so bad, but I had a barber shop in connection with the hotel and you could notice it very much on the towels when you put them on the face. A lot of the customers complained of it. I was last down to Town Creek on the plaintiff's property about 6 weeks ago, went into the pasture just there opposite the tank and down a few steps below. I noticed in particular that the grass was right up around close and I have seen some cattle there, about 60 or 80 yards away at the time and I have seen since where they grazed right up close. The old sewage outlet used to be about a half mile above where the Imhoff tank is now.

Redirect Examination

I think I have a good idea about rental values for grazing land around Harrisonville and assuming that the water in this Town Creek is pure for live stock I would say that the rental value of it was around $3.50 per acre per year.

W. R. SHELTON called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I moved to Harrisonville in the spring of 1913. At present I live a mile north thereof as the manager of the County Farm. I don't own any farm land at the present time, but have dealt in farm land in that vicinity, both as an agent and owner and was familiar in 1923 with the value of such land in Cass County, particularly that adjacent to Harrisonville.

"Mr. Hazard: (representing plaintiff) Your Honor, I want to anticipate the testimony and just add one fur-
146 ther ground to the objection. The value of land is determined by its capacity to produce income and I do not think that testimony, opinion testimony as to value, refutes prior testimony as to the income capacity of land, so I wish to add that ground to the objection.

"The Court: It will be received subject to the objection."

I am now familiar and in 1923 was familiar with the plaintiff's land in question about just west of the Missouri Pacific right-of-way. The reasonable market value of that land in 1923 in my opinion was something like $55.00 or $60.00 an acre and the present reasonable market value, is $50.00 an acre. Land is selling for less money all around now than it was in 1923. I have been down to the outlet of the sewer into Town Creek, at least twice that I remember. I noticed some odor around the outlet and possibly back forty or fifty feet. I am familiar with the rental values of land of this character around Harrisonville and in my judgment this land that is used for pasture purposes has a rental value of $3.00 or $3.50 an acre, that is assuming that the water course there is fit for cattle. When I was down there I could see signs of the cattle all around over the pasture. They had cropped the grass. I was down there on June 6, 1929 at the time some samples of water were taken and some pictures were also taken. Dr. George was also present and Mr. Bowman took the pictures. Also Judge Glenn was there. This photograph, defendant's Exhibit E, was taken there on that

occasion, June 6, 1929, and is a correct representation of the situation on that date. The pasture is just west of the railroad track. The sewer outlet into the stream is just on this bank here below where the men are standing.

I was also there on September 26, 1929, when other pictures were taken. At that time we measured the locations with a tape line and stepped off one of the long distances and made a note of them in the memorandum book which contains my signature.

J. H. NOWLIN, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I live in Cass County about six miles due south of Harrisonville, right down Highway No. 71, and have lived in that community about twenty-one years and I am engaged in the farming and live stock business, and I am now and was in 1923 familiar with the price of pasture farms in
147 and around Harrisonville. I own land down there. I am familiar with the plaintiff's property on the west side of the Missouri-Pacific tracks.

"Q. And what, in your opinion, was the reasonable market value of that tract of land in 1923?

Mr. Hazard: Same objection.

The Court: Yes, same ruling.

By Mr. James:

Q. What, in your opinion, was the reasonable market value of that tract of land in 1923, seven years ago?

A. '23, seven years ago? Well, land sold pretty high about then, I don't hardly know what it would have brought —brought pretty near all kinds of prices".

Its reasonable market value in 1923 was around probably $50.00 an acre. The reasonable rental value of that property is $3.00 to $3.50 an acre per year. Yes, sir, I have seen cattle grazing around in plaintiff's pasture around the outlet from this Imhoff tank, and I didn't see any difference in the grass there from any place else. I want to add that the answers I have given about the reasonable market value of the land and its reasonable rental value are based upon the assumption that the water is fit for cattle consumption.

Cross-Examination

The last time I was down there on the creek was yesterday morning. I went down to the outlet of the sewer and then down the creek a ways.

"Q. And you think that water is fit for cattle to drink, do you?

A. Why, yes, that is, it looks that way to me.

Q. You don't really know whether it is good for cattle or not?

A. Oh, I don't know what is in the water, no, sir."

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148 JOHN R. JAMES, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

I am one of the counsel for the defendant, City of Harrisonville, and engaged in the practice of law in Kansas City, Missouri, associated with the law firm of Cleary & Barnett, with whom I have been associated for the last nine years. I made a trip to Harrisonville for the purpose of taking samples of water out of the creek there. I took two sets of bottles, one that I picked up at the Kansas City Testing Laboratory at 7th and Baltimore and another from the Kinsley Laboratory in the New Center Building at 15th & Troost, and took those bottles in my car and went to Harrisonville and found Dr. Shelton. We went to the sewer outlet and filled these bottles at the sewer outlet and up and down the stream from the outlet, and made a memorandum at that time of the samples. I did the marking of the
149 bottles myself. We had some seals, little stickers, we put on the bottles and I numbered one set with letters and one set with numbers, and delivered one set back to the Kinsley Laboratory and the other set to the Kansas City Testing Laboratory on the same date with the numbers and letters on the bottles. No. 1 and No. A were taken right at the outlet, No. 2 and No. B, twenty feet down stream from the outlet, No. 3 and No. C fifty feet up stream from the outlet. No. 4 and No. D 150 feet up stream from the outlet, No. 5 and No. E 150 down stream and No. 6 and No. F an eighth of a mile down stream. We measured all the distances with a tape measure, except the last two, which we stepped off. I simply put the numbers and letters on the bottles and did not acquaint chemists or the pathologists with the locations from which the samples were taken. Exhibit E is a correct photographic representation of the

point right over the outlet of the sewer. It shows a cattle path running along between the top of the bank and the west railroad right-of-way fence. We wanted to show that the cattle frequented this particular spot in the pasture. The parties shown in the picture are myself, Judge Glenn and Mr. Shelton. Exhibit F is another photograph taken on that occasion. This was taken up the stream from the outlet and the cattle path shown in the other Exhibit runs right along this fence in Exhibit E and to the north and then turns northwest and crosses this creek after the creek makes a bend. This crossing is shown in Exhibit F. I have visited this Imhoff tank and Town Creek across from it twice, I believe. Both in the year 1929, first on June 6, 1929, when we took these pictures and later this year just shortly before this trial. On the first occasion we didn't go over to the tank. We crossed the railroad right-of-way south of the tank after coming down the golf course. There was a little odor on that trip right over and around the outlet. If you got a short distance away you didn't notice it at all. On the second occasion the odor was more pronounced. This visit was more for the purpose of observing the tank and how it worked and we went over and around and above the tank and then we went over to the creek. It was a sort of damp day. The first odor we detected was right in the corner of the golf course and probably more than fifty feet away from the tank and when we arrived at the creek I could not detect the odor further than 75 steps from the creek.

On the first trip I was down there I saw cattle in the pasture and observed them down stream just a short distance. When we got there I don't think they were over a couple of hundred yards away. They had been over around there as shown by this picture here. There was a cow path right over the outlet, going up the creek and across the creek and the grass was cropped rather short all around there, and showed plenty of signs of grazing. On the last occasion I noticed the cattle had been grazing there but I didn't see any cattle in the pasture that particular day.

Cross-Examination

By Mr. Hazard:

Q. Mr. James, do you know why that cow path is there?

A. There is no way of ascertaining that I know of why cattle will make a cow path. They have that habit of making cow paths.

Q. Don't you know that the ford for this creek is above the sewer outlet and the cattle have to come along that path in order to cross the creek?

A. The what you say is above?

Q. The cattle have to come along that path in order to cross the creek above the outlet?

A. Well, they can cross it below the outlet, do cross it below the outlet.

Q. Did you examine that creek carefully below the outlet to see whether there is a ford?

A. Is there one? I don't call it a ford exactly, there is a place where the cattle cross over a little ways down.

Q. Isn't that place above the outlet?

A. No, there is one just a short distance above the outlet.

Q. And is that the one this path leads to?

A. That is right, the one below is further down the creek.

Q. Do you know how far down?

A. No, I wouldn't be able to say, Mr. Hazard, how far that is. I am not a very good judge of distance.

Q. Now this ford that is above the outlet is quite shallow, isn't it?

A. Oh, yes, it is just sort of a riffle there. They always naturally go across the riffles, make their cow paths across the riffles.

Q. And this path leads right down to that? A. Yes."

Redirect Examination

Exhibit E shows a bank probably about as high a spot on the bank as there is. The bank runs up and down. At places where there are riffles the bank is lower. This is a narrow, very crooked stream, and the place below the sewer
151 outlet where the cattle cross to which I have referred is a place where the banks come down close to the stream again, also more or less of a riffle.

Dr. John D. Ray, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

My profession is that of veterinarian. I am associated with the Kinsley Laboratory in Kansas City, Missouri, a partner in the institution. We occupy about seven rooms in the New Center Building. I am a graduate of the North Carolina State College, Bachelor of Science degree in Agriculture in 1915; graduated from Kansas City Veterinary College in 1917 with a degree of Doctor of Veterinary Medicine, and was at one time an instructor in that institution. I worked in the Kinsley Laboratory while I was a student in the Kansas City Veterinary College and after graduation I

continued in the Kinsley Laboratory and was an assistant instructor in the college until I went into the army in July, 1918. When I returned from the Army in December, 1918, I returned to the Kinsley Laboratory, and I am now a partner in that business. We do a general laboratory diagnosis for veterinarians, consisting of both bacterialogic and pathologic diagnoses and we make vaccines for animals and serums. Our business extends practically all over the United States and once in a while in foreign countries. Dr. Kinsley, the head of the laboratory, is abroad at the present time.

I recall Mr. John R. James delivered me some samples of water on the 6th of June, 1929, of which I made an analysis, bacterialogic count, of the different samples, and made a report to the defendant's counsel of my findings. Defendants' Exhibit G is that report.

Defendants' Exhibit G.

"Kansas City, Mo.
June 12, 1929.

Mr. Raymond G. Barnett,
1118 Garritt Bldg.,
Kansas City, Missouri.
Dear Sir:

152 We have made a Laboratory examination of the six samples of water brought in June 6th and wish to report the following approximate bacteria counts:

No. 1	110,000	Bacteria	per	CC
No. 2	3,100,000	"	"	"
No. 3	55,000	"	"	"
No. 4	200,000	"	"	"
No. 5	450,000	"	"	"
No. 6	600,000	"	"	"

A further test indicates that all of these samples were contaminated with members of the colon typhoid germ. This usually represents pollution of animal origin and would be expected in streams draining pastures, barn lots, or other sewage contaminated areas.

We trust that this information will be of some value to you, and if further information is desired it will be cheerfully given.

Yours very truly,
KINSLEY LABORATORIES,
Per J. D. Ray (Signed)

JDR-S

On September 27, 1929, Mr. Barnett personally delivered to me certain samples of water of which I started the examination. They were completed in the laboratory, but Dr. Kinsley made the final report. Defendant's Exhibit H is the report made by Dr. Kinsley on that occasion.

"Mr. Barnett: We offer in evidence Exhibit H.

Mr. Hazard: Objection is made to Defendants' Exhibit H for the reason that the Exhibit is not identified, location from which samples were taken. There is no connection in the record between this report from the Kinsley Laboratory and the stream in question. Further ground for the objection is that the witness testified that he did not himself make this report or complete the tests upon which it is based.

The Court: Objection will be sustained.

Mr. Barnett: If I may interrupt the witness at this time, I will have to testify to two or three formal matters myself."

RAYMOND G. BARNETT, called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

153 Direct Examination.

I am one of the attorneys for the defendant, City of Harrisonville, and in the preparation of this case for trial visited that City and particularly Town Creek, on one occasion on September 27, 1929, when I took samples from Town Creek. I first picked up a group of bottles given me by the Kansas City Testing Laboratory, likewise a group of bottles from the Kinsley Laboratory, they were sealed, and took the two groups of bottles to Harrisonville, met Judge Glenn and Mr. Shelton and two other gentlemen. We went to the creek and the samples were taken in pairs, one bottle out of each of the two groups of bottles. As soon as the samples were taken the bottles were sealed and I brought them back in that condition, turned one group over to the Kinsley Laboratory and the other group to the Kansas City Testing Laboratory. They were furnished me by the laboratories in order that I might have sealed and sterilized bottles. I have here a memorandum which I made at the time in company with those other gentlemen when we measured off the distances and the two samples marked No. 1 were taken ninety-five feet above the outlet of the sewer. Two samples, marked No. 2, were taken 190 feet above the outlet. Two samples marked No. 3 were taken 30 feet below the outlet, two samples marked No. 4 were

taken 95 feet below the outlet, the two samples marked No. 5 were taken 230 feet below the outlet, and one bottle, a sixth sample, 560 feet below the outlet. In the other group of bottles there were only five so that this sixth sample was taken in one bottle only instead of in pairs. I delivered one of these groups of bottles to the Kinsley Laboratories and the other to the Kansas City Testing Laboratories, giving no information whatever as to where the samples were taken, the bottles being merely marked with these numbers and no information on the bottles to show where they were taken.

DR. JOHN D. RAY, recalled by the defendant, City of Harrisonville, testified further as follows:

Direct Examination.

Q. To what extent, Doctor, did you have anything to do with the making of the tests on these samples delivered to your laboratory on September 27, 1929?

A. I received the samples and started the test, but did
154 not count the colonies in the plates that were pulled.

Q. Did you have any arrangement with your associate, Dr. Kinsley, with reference to doing that? A. Yes, sir.

Q. Who did do it? A. Dr. Kinsley, personally.

Q. Are you familiar with his signature? A. Yes, sir.

Q. Is this his signature on the bottom of the letter?

A. It is.

Mr. Barnett: We offer Exhibit H in evidence.

Mr. Hazard: The objection is renewed on the ground that Defendants' Exhibit H is hearsay. The witness testifies he himself did not make the count which is, of course, the whole substance of the testimony.

The Court: It would not be competent, gentlemen, unless it were an official document of some sort, required to be kept. It is a private document.

Mr. Barnett: Of course, this is a report made by a business institution. Dr. Kinsley himself is absent in Europe at the present time.

The Court: It is just the same as if he told somebody that. The letter would have no further significance than if he told somebody what the results of his test were and he were telling that to us.

Q. (By Mr. Barnett) I will ask you if you made any check of that count yourself?

A. I was out of the city.

The Court: The objection will be sustained."

(To the ruling of the Court the defendant, City of Harrisonville, at the time duly excepted and still excepts.)

Exhibit H is in words and figures as follows:

Defendants' Exhibit H.

"Kansas City, Mo.
Sept. 30, 1929.

Mr. Raymond C. Barnett,
1118 Scarritt Bldg.,
Kansas City, Mo.

Dear Sir:

We have made a laboratory examination of the 6 samples of water delivered to the laboratory on September 27th, 1929, and wish to report the following approximate bacterial counts:

No. 1—	252,000	bacteria	per	CC
No. 2—	2,050,000	"	"	"
No. 3—	4,040,000	"	"	"
No. 4—	2,375,000	"	"	"
No. 5—	1,650,000	"	"	"
No. 6—	1,970,000	"	"	"

We trust that this information will be of value and if further information is desired, same will be cheerfully given upon request.

Yours very truly,

KINSLEY LABORATORIES,
Per A. T. Kinsley (signed)"

ATK:s

The witness continuing: Referring to Exhibit G in evidence, I wish to say that in my judgment as a witness there is nothing appearing in that analysis showing that the water is unfit for stock consumption. Neither does anything appear in the chemical analysis shown in defendants' Exhibit I indicating that the water is unfit for cattle consumption. Nor is there anything in defendants' Exhibit J, as chemical analysis, which indicates that the water carrying those chemicals is injurious to stock to drink.

We don't ordinarily consider human contaminated water dangerous to stock, but water contaminated from animal origin would be considered worse than of human origin. We do not consider that diseases of human beings, diseases of the alimentary tract are transmissible to cattle and stock. Cattle customarily drink the water that they stand in and defecate in and tramp around in and even that water is not ordinarily considered dangerous for cattle to drink. And yet I would consider such water more dangerous or more likely to be dangerous to stock than water showing the bacterialogic count in Exhibit G and the chemical analysis in Exhibits I and J, because the water which is cattle contaminated would have a chance of having parasitic diseases or some cattle condition that wouldn't be found in water that has not been associated with contamination of fecal matter from cattle. I find nothing in Exhibits G, I and J to indicate that water of that character would cause a cow to slip a calf.

156 Cross-Examination.

No, I have not seen the source from which these samples were taken. It is usual for cattle to pasture in land through which a creek runs and to drink the water in the creek. In making my tests I used a standard agar. The incubation period was forty-eight hours at thirty-seven degrees centigrade. I don't remember the dilutions that were made but there were several dilutions used. The dilution water was sterile. I received the samples, which are the basis of the report marked Defendants' Exhibit G, on June 6, 1929. I had no knowledge of the taking of the samples or transportation of them to my laboratory. The taking of the samples under proper conditions is an essential feature of the test.

"Q. Now, I will call your attention to Defendants' Exhibit G, and I will ask you to notice No. 2, and state the number of bacterial count that that shows.

A. Three million one hundred thousand.

Q. Now, what is the number of the count in No. 3?

A. Fifty-five thousand.

Q. Now, assuming that those samples were taken from a creek and the one showing three million one hundred thousand count was taken at a point seventy-five feet lower than the one showing fifty-five thousand, would you say that your tests show some radical change in the water in that creek?

A. I would say it shows a radical difference in bacterial content.

Q. Well, what conclusion do you draw from that? There is a space of just seventy-five feet in the flow of the creek.

A. I would consider that there was possibly a difference in the character of the stream where they removed these samples.

Q. Some difference in the character of the stream, and would you say that that difference would be great?

A. Well, I wouldn't say it was so very great.

Q. Well, it is the difference between three million one hundred thousand and fifty-five thousand?

A. The difference would be entirely dependent upon getting just one little lump of dirt into a sample and checking it up.

157 Q. Well, then, you think possibly that might be explained by some lack of care in the handling of these samples? A. Not necessarily.

Q. Well, then, why did you refer to the lump of dirt?

A. Material floats in the stream. The reason that I answered that way, any debris that floats in a stream would get into a bottle and would make a difference.

Q. Well, then, if such differences as that are possible, can you place any reliance upon your test of samples that you did not take yourself?

A. All I have to rely on is what I found in the bottle submitted.

Q. I will show you Plaintiff's Exhibit 5 and I will ask you to assume that in the creek from which the samples of water were taken which were the basis for your report, Plaintiff's Exhibit G, between the point where your sample showed a 55,000 bacteria count and the point where your sample showed a bacterial count of 3,100,000, the outlet from a sewage disposal plant flows into the creek, and from the water in the creek below the outlet of that sewage disposal plant, this sample contained in Plaintiff's Exhibit 5 was taken. Now, with that information, would you say that your examination and your report has any bearing on the condition of pollution in that stream below the sewer outlet?

A. That jar of water won't have any bearing on them,—

Q. (Interrupting) No, I am asking about your tests?

A. I don't think a condition like that in the bottom of a creek would make any difference.

Q. That was not my question, doctor. I asked you, with that information contained in my hypothetical question, whether your report would have any bearing upon whether or not the condition of pollution exists in that creek?

A. Well, my report would indicate that there was more organisms down the stream than there is up the stream.

Q. Yes, and might that be due to the injection of the outflow from the sewage plant into the stream?

A. Yes, sir.

158 Q. Now, you spoke of contamination from cattle and your report states that a further test indicates that all of these samples were contaminated with members of the colon typhoid group. You don't get that group from cattle contamination, do you? A. Yes, sir.

Q. You do? A. Yes, sir.

Q. Did you isolate any typhoid bacillus?

A. No, sir.

Q. You don't get the typhoid bacillus from cattle contamination, do you A. No, sir.

Q. Now, is it true that in the taking of the sample of water that the result from the subsequent tests may be affected by very slight things; for instance, such as touching the cork with your finger?

A. Well, that would cause a variation in the test, yes.

Q. You would always prefer, wouldn't you, doctor, to take your own samples under the control conditions that you know how to regulate?

A. That is the ideal method for a test.

Q. Were any samples brought to you that looked like this? A. No, sir.

Q. Was the water brought to you clear?

A. No, sir.

Q. What was the color of it?

A. Well, it was clear after it would settle out, but it had more or less sediment in it.

Q. You mean something like the sediment in the bottom of that bottle there?

A. Well, something of that nature.

Q. The sample that was brought you looked about like that, did it?

A. Well, some of them looked worse than that.

Q. But that was the nature of the sediment that was in it?

A. Well, you could see it in the form of flocculation.

Q. Now, doctor, if a sample had been brought to you like this, would you say that such a sample would show the same result that was shown by your report here?

A. No, sir.

Q. What results would it have shown?

A. If it was dug out of the bottom of a creek you probably couldn't count them.

Q. Couldn't count what?

A. The bacteria.

Q. Three million wouldn't be a start?

A. No, sir, it wouldn't make any difference where you got it.

159 Q. Now, you know, doctor, that a condition like that in the bottom of a creek, if that creek is stirred by a cow stepping into it, or by any disturbance of any nature, that that would permeate the whole body of water?

A. Yes, sir.

Q. And if water that is even as clear as that has this below it is stirred, the sample taken from water like that would show vastly different results than the ones brought to you? A. I think so.

Q. You made the remark, doctor, that samples taken from the bottom of a creek would show vastly higher bacterial count, and it wouldn't make any difference where it was taken from. What did you mean when you said it wouldn't make any difference where it was taken from? Did you have reference to this sewer outlet?

A. It might be taken above or below the sewer and taken off the bottom of the creek and you would get enormous counts, regardless of the sewage pollution.

Q. You are speaking of any creek that carries some decayed vegetation?

A. Yes, sir.

Q. And would the fact that if you took such a sample from the bottom of the creek and got such an increased bacterial count still indicate that the water was unfit for cattle consumption?

A. I wouldn't consider it so.

Q. Something was said there about a count of 3,100,000 specimen and a count of 55,000 on another specimen, and you stated that that didn't represent a very great difference. What do you have in mind is a great difference in the matter of bacterial count?

A. That is merely an arbitrary figure. In water for live stock if you had a hundred million against one hundred thousand it would make quite a difference.

Q. How high would your bacterial count get before you could begin to consider whether it is dangerous for stock?

A. I don't know.

Q. You don't know. A. No, sir.

160 Q. Well, would water with a bacterial count of three million as is shown in one specimen there indicate any danger to cattle in the use of that water?

A. Not unless it contained pathogenic organisms for cattle.

Q. There is some reference here in a letter about tyhoid bacillus. Would the appearance of that typhoid germ in

the water if it were a typhoid germ coming from human sewage represent any danger to cattle?

A. No, sir. I used the reference of colon typhoid group in the broad sense in that typhoid organisms from human colon organisms are grouped bacterialogically in the old standards as belonging to the same group.

Q. And the finding that you made in that particular point didn't indicate any danger to the cattle?

A. No, sir.

Q. Did you know that there were three and thirty-five hundredths inches of rain within six days or a week preceding the time these samples were taken?

A. I didn't know how much. I know it had rained recently when—I don't remember which one, but one was taken after the rain.

Q. That would have an effect on the character of the samples taken from the creek, would it not?

A. Yes, sir.

Q. Now, you don't mean to say that the injection of this sewage into the creek makes no difference in the potability of the water below the sewage outlet, do you? I will ask you further to assume that the sewage plant has a capacity of one hundred thousand gallons a day and that the creek is a small creek, sometimes dry except for its pools.

A. That kind of water isn't considered injurious to animals.

Q. What kind of water?

A. Water from sewage outlet.

Q. Well, I will ask you to further assume that tests in that creek below the sewage outlet showed no dissolved oxygen whatever; is such water fit for consumption by animals?

A. What difference does it make?

Q. Well, I am asking you a question?

A. We have no record of any injury from such water.

Q. What do you mean by "such water"

A. Water from sewage contaminated creeks in the condition you describe here.

161 Q. Then your testimony is that a fluid in this creek which contains no dissolved oxygen is fit for consumption by animals, is that your testimony?

A. Yes, sir.

Q. And your testimony would be that in dry times when the creek bed was almost entirely dry, the animals might drink the sewage outflow without harm?

A. I think so.
Q. Will cattle drink such fluid?
A. Yes, sir.
Q. Do you recommend that type of water for cattle?
A. I wouldn't recommend it if you had good water in place of this. I will make a reservation on my answer with reference to the danger of this sewage outflow. If this sewage contains poisonous chemicals other than human excreta it would be dangerous to cattle.
Q. Well, assuming that it is the sewage outflow from a town, normal sewage flow, your testimony is that it is adequate watering for cattle? Is it, doctor?
A. I don't think it would hurt them.
Q. You don't think so? A. No, sir.
Q. Just as good as water that is unpolluted by sewage?
A. As far as you can tell from the cow.
Q. You would just as soon turn cattle into a pasture with an open sewage polluted stream as one which was free of sewage?
A. Just your human dignity would be the only thing that would make any difference in my judgment.

Would cattle watered with sewage pollution thrive just as well as cattle watered with fresh water, pure water?

Q. Well, there might be a difference over a long period of time.
Q. Well, how much time? A. Six months.
Q. Well, now, assume a condition which has obtained for five years in which a small creek almost dry at times, receiving the outflow from an Imhoff tank that has a capacity of a hundred thousand gallons a day, what effect would you say that type of watering would have over a five year period on a herd of registered blooded cattle?

Mr. Barnett: That question is objected to for the
162 reason that it is not founded upon any facts in evidence. The evidence is to the contrary, that there is water in this stream up above the sewage outlet in this pasture, there is water in Muddy Creek in this same pasture before it gets to the junction with this stream, that there is water in some pond upon the place, that the cattle have not been drinking continuously and uninterruptedly of this one source during the entire period, that they have been in the pasture.

The Court: The objection is overruled. Let him answer the question. Let's see what he says. I understood, how-

ever, that the cattle were not drinking this water at all, that they refused to drink it.

Q. Yes, there is testimony to the effect that they refused to drink it, also testimony at times when there was no other place to drink, they drank it.

(To which ruling and action of the Court, the defendant, City of Harrisonville, at the time excepted and still excepts.)

A. Well, I don't think over a period of five years you would have these stagnant holes that the cows would have to drink out of over a period of five years.

Q. That isn't the question. The Court will let you assume the facts I have stated and you can make an answer as an expert on the basis of that assumption?

A. I don't know.

Mr. Hazard: That is all.

Redirect Examination

By Mr. Barnett:

Q. Doctor, have you ever heard of any tests being made where cattle were limited for their water supply to water containing human sewage over a period of five years?

A. No, sir.

Mr. Barnett: That is all.

(Witness excused)

Orion J. L. Brookhart called as a witness on behalf of the defendant, City of Harrisonville, testified as follows:

Direct Examination

163 I live in Harrisonville, Missouri, and yesterday evening upon adjournment of this trial I received instructions from Judge Glenn to take some samples of water out of Town Creek and did take such samples both above and below the outlet of the sewer. This one (defendants' exhibit K) which is marked No. 1, was taken 91 steps below the sewer outlet of this Imhoff tank into Town Creek. No. 2 (Defendants' Exhibit L) was taken 63 steps up stream from the sewer opening and Defendants' Exhibit M was taken 310 steps up stream from the sewer opening. The two dark ones here taken above the sewer outlet were taken in the stream after I stirred it up. I didn't take it from the bottom of the stream but from the body of the stream after stirring it up by walking in the stream. Exhibit K was just lowered down to where

the water ran over a little limb that had fallen across the stream and let it run full of water, holding the neck of the bottle so that the water would run in. It was possible to get samples down stream that would be just as dark as the samples shown in Exhibits L. and M. and possible to get samples up stream just as light as that shown in Exhibit K, which was taken below the outlet. The sample in the small jar was taken in water a little over knee deep and the one in the large jar possibly six or eight inches deep, and the clear sample was taken by holding the jar from the edge of the creek. The water there looked like possibly a foot deep.

I am familiar with the rental values in and around Harrisonville, and I am familiar with the plaintiff's property on the west side of the Missouri Pacific. The reasonable rental value of that land upon the assumption that the creek even below the sewer outlet is fit for cattle consumption is $3.50 to $4.00 an acre per year. In 1923 it had about the same rental value. I was familiar with Town Creek even before 1923 when the disposal plant was built, all the way from the northeast part of town to where it empties into Muddy Creek. There is no great difference between the present stream below the sewer connection and the character of the stream before the disposal plant was erected, except that probably below the outlet now it is slightly discolored, has a little whitish-blue cast to it, but no material difference. The stream now even above the sewer outlet carries a great deal of dead vegetation, logs, leaves, things of that kind that have col-
164 lected in the bottom of the stream and form a kind of black ooze. This is true of the stream both above and below the sewer outlet.

The water formerly piped over the City of Harrisonville from Luna Lake had quite an odor to it, which could be detected very easily, up in the city when the water ran from the pipes and faucets. I never heard of anyone drinking that water.

I have been in this pasture of the plaintiff since 1923 and I have observed that the cattle seem to graze along there all the time. I have seen them in there practically every time I go down there and in the last years I have been there real often, sometimes two or three times a week and sometimes it would be three weeks between times.

Cross-Examination

No, I did not wade out in the sewage in taking the sample below the sewer outlet. The water below the sewer outlet

did not smell bad at the place where I took the sample. I do not know what it is in the bottom of Defendants' Exhibit M, except that it is whatever was in the creek. I can't see any difference between the deposits in the bottom of Defendants' Exhibit M and Plaintiff's Exhibit 5, except possibly that that in Exhibit 5 is a little blacker. I did not stir up the creek where I took the sample (Exhibit K) below the outlet. I took it right off of the top of the water. I see very little difference between Defendants' Exhibit K and Plaintiff's Exhibit 3. Exhibit K is a little more cloudy than the other. Lake Luna flows into Town Creek only in periods of high water, that is, when it is low it doesn't flow over the overflow. I wouldn't consider the water in that creek good at any time. It is probably worse in hot weather. I oversee the sewage plant, have been in charge about three years. The by-pass exists for the purpose of by-passing sewage if it ever has to be done, while repairs were made on the tank, should it ever have to be repaired. I never use the by-pass. No repairs have been made on the tank in the last three years requiring its use. The only repair I recall was putting in one new valve and we put in a piece of tile out in the drive there. This by-pass has never been opened since I took charge of the plant. That exact date I don't recall. I know
165 nothing about its having been opened before that.

I am down there possibly two or three times a week and then sometimes it will be a couple of weeks between trips. I go down to make an inspection to see how the men are taking care of it, that they are giving it the proper attention, that is the men hired for that purpose. I am there sometimes when the men are and sometimes when they are not. There is never any occasion to open the by-pass that I can see. I inspect the by-pass, however, just look down the manhole, not every time I am down there, but practically every time. Yes, sir, the by-pass can be opened at any time and then the raw sewage would flow right around the tank. The way that is handled is to cut off the line that leads to the tank and that raises the water and makes it by-pass through a higher tile. No, I don't believe that any sewage can flow into the tank and through the by-pass at the same time, because if the openings to the tank are open it runs off into the tank at the lower level. It would, however, be possible if the water level at the intake were high enough. The difference in height between the inlet to the tank and to the by-pass is several inches, two or three, or five or six.

JOSEPH G. HAWTHORNE called as a witness on behalf of defendant, City of Harrisonville, testified as follows:

Direct Examination

I live in Kansas City, Missouri, and I am a chemist.

"Mr. Hazard: We will admit Mr. Hawthorne's qualifications."

The witness continuing: I have had samples of water from Harrisonville brought me by Mr. Black of Black & Veach. I received these samples four or five times and made a report each time. I also received samples from the firm of Cleary & Barnett. From the latter, defendant's attorneys, on one occasion I received samples on June 4, 1929, of which I made an analysis. The bottles were delivered to me sealed and capped. They were marked with the letters, A. B. C. D. E. and F. As far as I remember the water contained in the samples was of approximately the same color throughout. I had no knowledge as to whether the samples were taken above or below the sewer outlet. Exhibit I is my report and a correct chemical analysis of those samples that were
166 left with me. It is correct in so far as the determinations were made. It isn't a complete analysis of the water, but we determined certain things which are enumerated on the report.

"Q. And that analysis was made for the purpose, was it [now], of testing the usability of this water for stock?

A. Well, I don't recall precisely that the examination—recall making the examination for that purpose. It was made for, as I remember, for the purpose of determining whether or not the water was contaminated with sewage or similar contamination.

Q. And I will hand you Exhibit J, pages 1 to 5 inclusive, and ask you if these pages constitute a report which you made to the firm of Cleary and Barnett, concerning certain samples that were left with you on the 27th of September, 1929?

A. Yes, sir, they are reports of analyses of those samples.

Q. And in that case, Mr. Hawthorne, having reference now to the color of the sample, in that connection I call your attention to the varied-colored specimen that are here upon the Court's desk, differing quite extremely from quite dark to quite light. I will ask you if the samples that were delivered to you were substantially uniform in color?

A. As far as I remember they were turbid and uniformly turbid."

These samples were numbered 1, 2, 3, 4 and 5 and there was nothing to indicate whether they were taken above or below the sewer outlet and we had no information in making the report of our chemical analyses either in September or June, of the place where the particular samples were taken. Exhibit J is a correct analysis of the samples left with us in September. All of these samples show evidence of organic contamination, that is they are contaminated with organic matter, which is undecomposed and they are waters on that account which I would say are obviously not fit for human consumption, but probably could be consumed by an animal without causing disease in that animal. I include all the samples when I say that they are not fit for human consumption. We furnished the containers for these samples in order that the container would not of itself be contaminated. I refer to the containers furnished to Mr. James and Mr. Barnett.

167 Cross-Examination

Plaintiff's Exhibit 15 covered a sample taken 20 feet below the sewer and shows 399 parts of solids per million. And plaintiff's Exhibit 16, a sample 60 feet below the sewer outlet shows 497 parts of solids per million. On the face of the analysis this would show a difference above and below the sewer outlet and that there had been added by the material discharged into the stream from the sewer outlet 98 parts per million of solids. Plaintiff's Exhibit 15, an analysis of water from above the outlet, shows that the loss on ignition of total solids was 93 parts per million and plaintiff's Exhibit 16, an analysis of water from below the outlet, shows loss on ignition of 160 parts per million. This would show that there had been added to the water 67 parts per million of the material which is destroyed on burning and which is most probably organic matter, sewage. Plaintiff's Exhibit 15 shows that the oxygen consumed is 10.4 parts per million and plaintiff's Exhibit 16, 17 parts per million. That would be accounted for by the increase in organic matter, as the oxygen consumed is a measure of the amount of organic matter present and sewage contains organic matter. I would say that the water both above and below the sewer outlet is not good water. Of course the one having the higher amount of organic matter from a sanitary standpoint is not as good water as the other. Exhibit 17, a report of samples taken twenty feet above the sewer outlet shows solids 438 parts per million, and Exhibit 18, taken sixty feet below the sewer outlet, shows a total solids of 540 parts per million. These Exhibits and Exhibits 19, and

20, 21 and 22 are all reports I made on samples taken above and below the sewer outlet, tests made by me. In each case the total solids below the sewer outlet is greater than above and the same way with the organic matter, which is higher in each case in the sample taken below. The fact that a sewer outlet intervenes between the two points indicates that there is sewage pollution in the creek below the outlet that does not exist above the outlet.

Redirect Examination

168 The samples both above and below show that the water is unfit for human consumption. But both above and below it was fit for animal consumption without causing any disease in the animal.

Recross Examination

If there was dissolved oxygen present in the water above the outlet that would indicate that all of the organic matter—that there was no organic matter capable of further oxidation existing in the water, whereas, if in place of dissolved oxygen, the water below the outlet were capable of consuming oxygen, then that would show that there was present in the effluent entering into the stream, organic matter which was not fully oxidized, and would indicate considerable difference in the two waters. If there is no biochemical oxygen demand 100 feet above the sewer outlet and at a point sixty-five below the sewer outlet and fifteen hundred below the outlet the biochemical oxygen demand is seventy, that would indicate that above the outlet the organic matter which, provided there had been organic matter present in the stream, had become fully oxidized, whereas below, there had been added to the stream organic matter which is not fully oxidized and will require both time and distance to become oxidized. Raw sewage is organic matter that is not oxidized. The biochemical oxygen demand of one hundred ninety-eight at the outlet pipe where the sewage flows into the creek shows a relatively large amount of unoxidized organic material or raw sewage present in the effluent. Taking all these facts into consideration I would say that this water of the stream below the sewer outlet would not affect beef cattle very much, but that it wouldn't be very good for dairy cattle, not so much because of their drinking the water, but more because the animal itself might come in contact with water and thereby introduce into a dairy a type of contamination which is not desirable. As for a blooded herd where they are raising calves every year, high grade, blooded, registered stock, I must admit that I am not enough of a vet-

erinarian to fully qualify myself to answer the question. Of course in this whole question of sanitation and sanitary water supply the mind of a chemist or one dealing with water supply is usually devoted to most of the common
169 water-borne diseases which affect a human. The most common one is typhoid. I don't think cattle are susceptible to typhoid fever, and for that reason they are not subject to getting typhoid fever from a water supply. I can't see any reason why cattle would be harmed by such water, but of course, as I have said, in the case of dairy cattle the animal perhaps is out in the field and gets into a contaminated water supply which may contain the organisms of typhoid fever and might carry it into a dairy, and I wouldn't consider the water fit for dairy cattle. Fish will not live in such water as that below the outlet; they will not live in any water that doesn't contain dissolved oxygen.

"Q. Now, a condition where there is no dissolved oxygen at all, and the biochemical oxygen demand that begins with 198 and carries down the stream as high as a hundred, would you say that carried a condition of gross pollution, assuming of course, a stream can dry at times, a very small stream and assuming also an Imhoff tank with a daily capacity of 100,000 gallons?

A. Well, I notice you say the stream is dry at times. Of course, that is a very important factor. If there is always moving water in that stream, that is quite a factor in the destruction of this sewage, the movement of water going over riffles, contact with air. On the other hand, if the stream is one that will dry up in the pools at dry times of the year, then, of course, the pollution then is probably more apparent to the nose than anything else. That is, the decomposition ultimately takes place, but the stream is stagnant during that time.

Q. Such a stream would be pretty badly polluted, wouldn't it? A. Yes, I should say so.

Mr. Hazard: That is all."

(Witness excused.)

Other Witnesses

At this point in the trial for the purpose of shortening the examination it was agreed that the defendant, City of Harrisonville, had present in Court some ten additional witnesses, residents of Harrisonville and the vicinity thereof, and that among them were Jack Russell, S. M. Wirt and

MR. CARPENTER, who would all testify that the reasonable rental value of the property in question is $3.00 to $3.50 per acre and that this stream prior to the installing of the Imhoff tank was receiving sewage from the old county sewer and receiving the drainage from the City of Harrisonville and that on the banks of the stream there is a cemetery and a slaughter house and that the cattle on plaintiff's land, west of the railroad, ate the grass all along the stream and that the grass of the pasture was cropped close. Others of these witnesses were MR. M. E. HALCOMB, FRANK CONGER, MR. DAN DAVIS, MR. FRED J. THOMAS and MR. WALTER BENN, who would testify that they have played golf practically every day on the Harrisonville golf course for the last two years and that at no time have they smelled any odor from the sewage tank further away than fifty yards. Also among these witnesses are MR. WORD MATHEWS and MR. GRIFFIN, who would testify that prior to the installing of this Imhoff tank but not since that time there was a cream station or condensery for milk, on the creek, which discharged its water into the creek, and that this creamery was there up until at least 1920.

"Mr. Hazard: Objection is made to this testimony for the following reason: The showing of a condition of pollution in the creek from the natural wash from the city is not a defense to this cause of action. While the city may enjoy the rights of a higher riparian owner, so far as its natural wash is concerned, it has no right to collect its sewage into one point and discharge it into the water course and upon the land of a lower riparian owner, more than would result from it naturally. This objection is lodged to all of this testimony so far as it bears upon that point."

Mr. Hazard: I am referring to the cemetery and perhaps to the slaughter house and to all of the private sewage disposal plants that might exist. I am referring to the whole question of contamination in this creek above the outlet, and I have one other ground: Although a water course may in some measure be contaminated, such contamination does not give the upper riparian owners a right to increase by artificial means the contamination to the damage of a lower riparian owner. That objection is lodged to all of this testimony so far as it bears upon that point.

171 And thereupon Defendant, City of Harrisonville, rested its case.

Plaintiff's Rebuttal Testimony.

Plaintiff offered in evidence a certificate of Plaintiff's incorporation under the laws of the State of Delaware dated June 30, 1925, and an amended copy of incorporation of plaintiff under the laws of said state dated July 6, 1925, and the same were received.

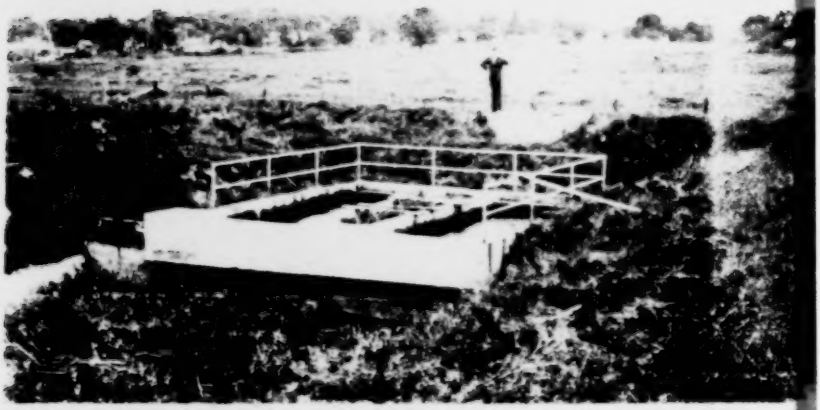
This completed the trial of the case and except for the Exhibits hereinafter referred to constitutes all of the evidence submitted in the trial. All witnesses were duly sworn. All of the Exhibits heretofore set out and all of the Exhibits hereto attached, to-wit: Plaintiff's Exhibit 1 and Exhibits 8 to 14 inclusive and Exhibits 15 to 22 inclusive, and Defendants Exhibits B. and E. and F. and I. and J., were offered and received in evidence, with the exception of Defendants' Exhibit H.

Exhibits 3 to 7 inclusive and Exhibits K, L and M, were physical exhibits which were repossessed by the respective parties upon the close of the trial.

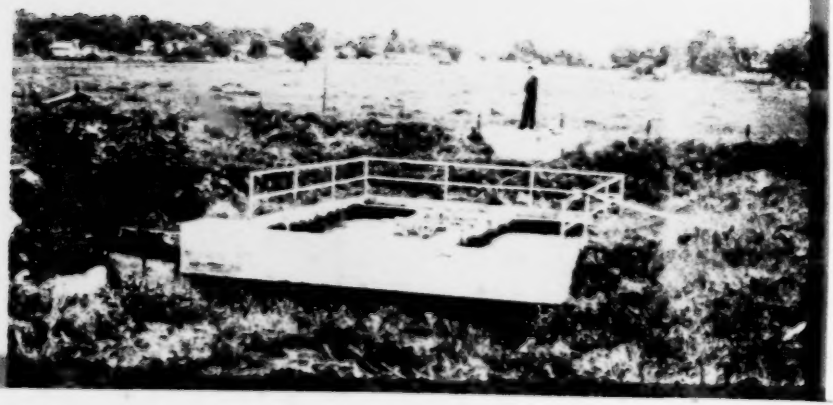
172 At the close of the testimony of the witness, Leslie A. Bruce, Mr. Hazard offered in evidence plaintiff's Exhibit 1, previously marked by the reporter and identified by the witness W. S. Dickey as a correct plat of the farm in question showing the right-of-way of the Missouri Pacific Railroad, said Exhibit 1 being hereto attached as follows:

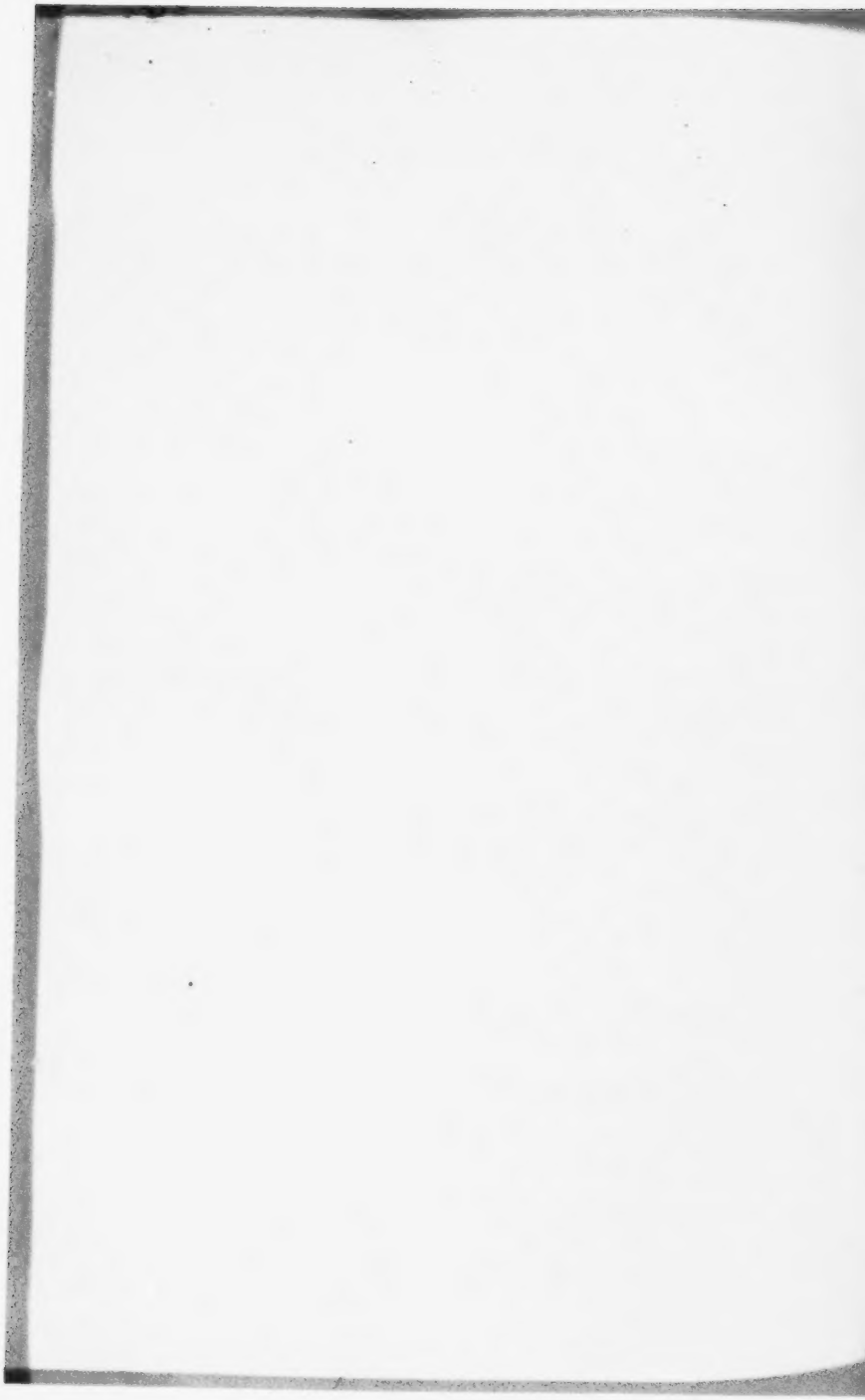
173a At the close of the direct examination of the witness, E. B. Black, Mr. Hazard, for the plaintiff, offered in evidence Exhibits 3 to 14 inclusive. Exhibits 3 to 7, inclusive, were physical exhibits, namely bottles of water identified by the witness Black and repossessed by plaintiff at the close of the trial. Exhibits 8 to 14, inclusive, were pictures of the Imhoff tank identified as such by the witness Black, said exhibits 8 to 14 inclusive are hereto attached as follows:

Plaintiff's Exhibit 8.

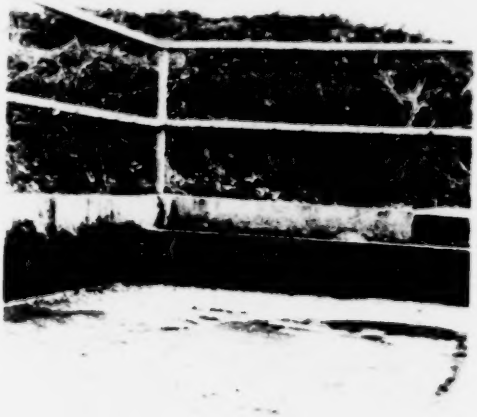


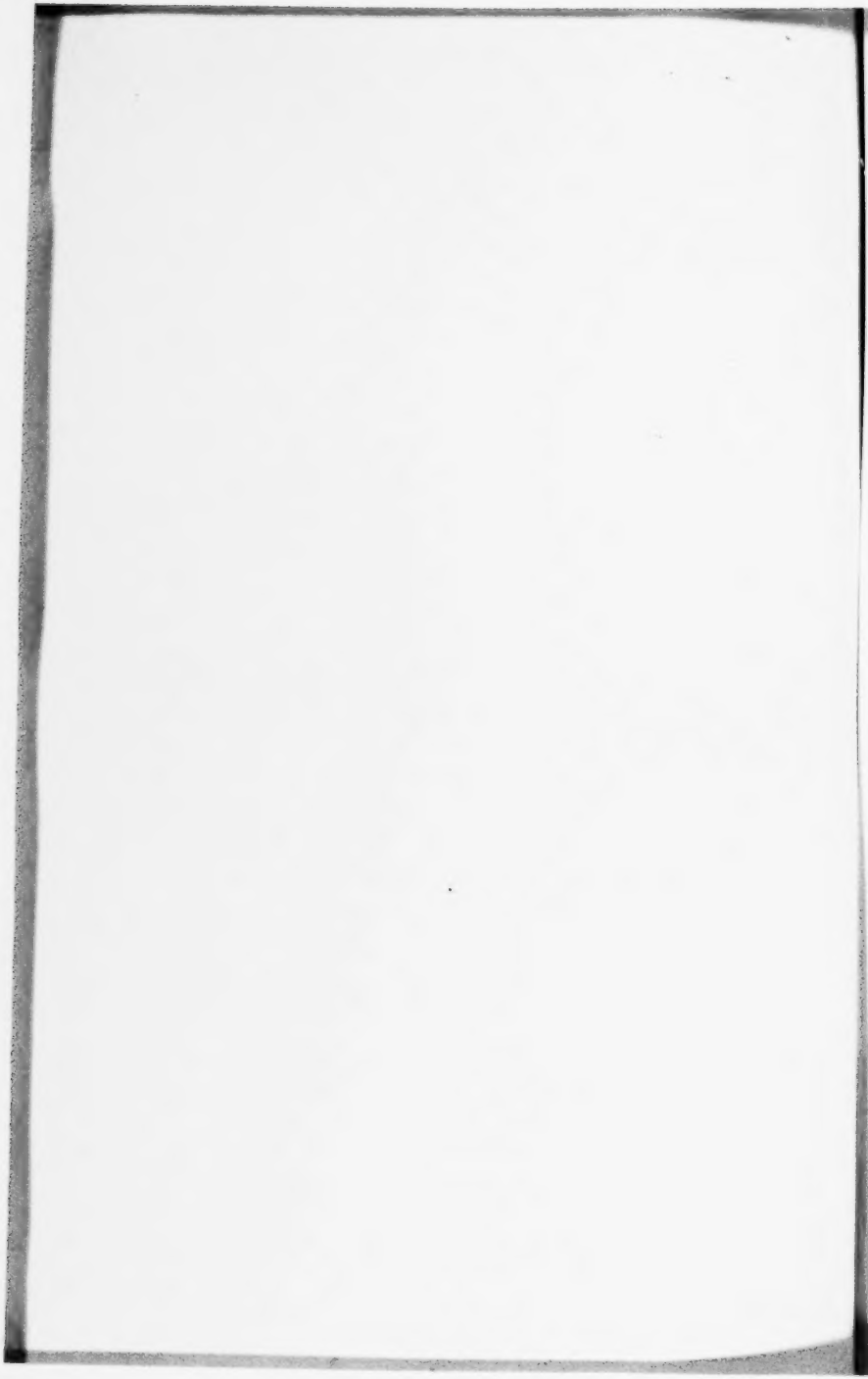
Plaintiff's Exhibit 9.



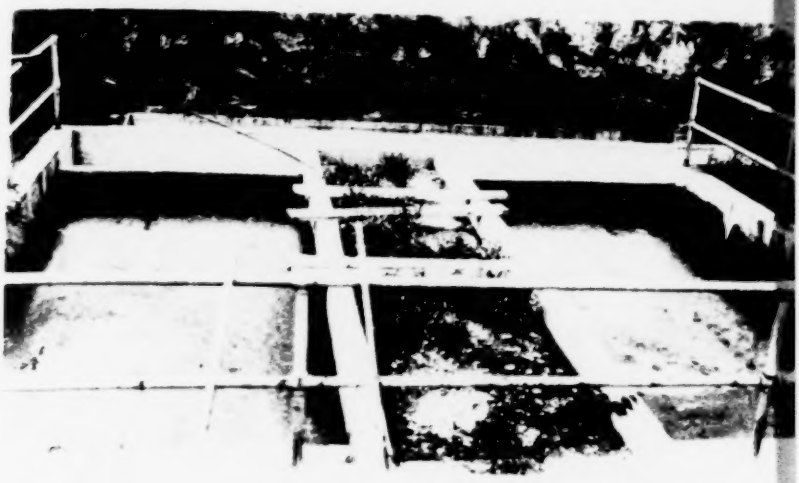


Plaintiff's Exhibit 11.



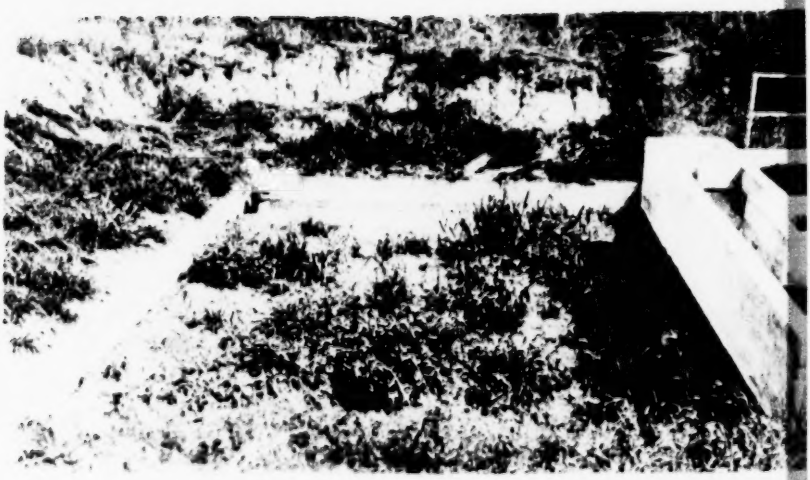


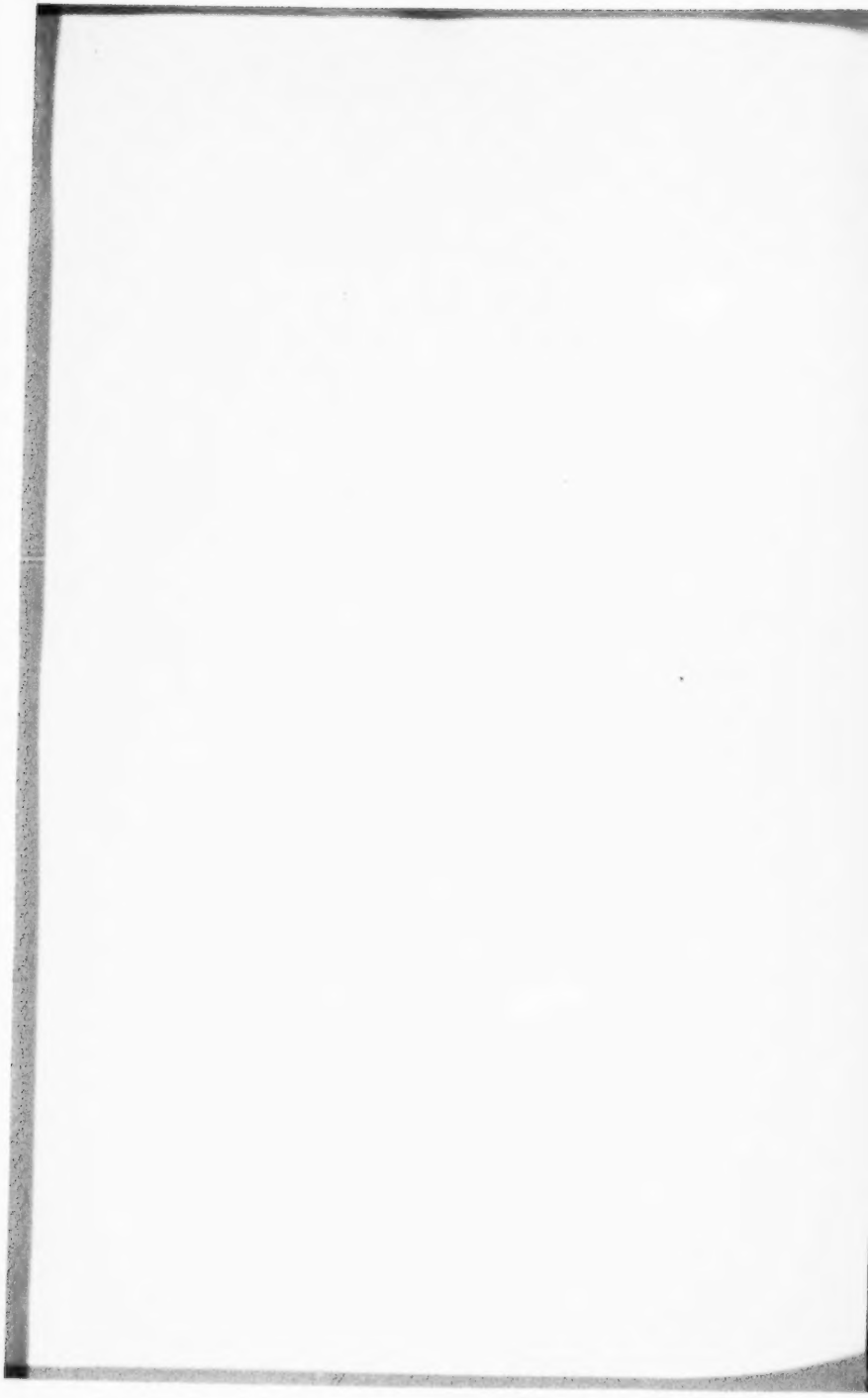
Plaintiff's Exhibit 12.



Plaintiff's Exhibit 13.

Plaintiff's Exhibit 14.





178 At the close of the evidence Mr. Hazard, for the plaintiff, offered in evidence plaintiff's Exhibits 15 to 22 inclusive, previously marked for identification by the reporter and identified by the witness, Joseph G. Hawthorne, as chemical reports made for plaintiff of samples of water taken from the creek at various locations, said exhibits being hereto attached as follows:

179 Plaintiff's Exhibit #15

BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date August 14, 1929 Laboratory No. 124,136

Sample Marked Water from creek, 20 ft. above sewer, Harrisonville, Missouri

August 11, 1929

Analysis:

	Parts per million	Grains per U. S. Gallon
Total solids	399.0 ppm	23.33 grains
Loss of ignition of total solids	93.0 "	5.43 "
Oxygen consumed	10.4 "	0.61 "

Remarks:

Respectfully Submitted,
KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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180 Plaintiff's Exhibit #16

BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date August 13, 1929 Laboratory No. 124,137

Sample Marked Water from creek 60 feet below sewer outlet, Harrisonville, Mo.

August 11, 1929

Analysis:

	Parts per million	Grains per U. S. Gallon
Total solids	497.0 ppm	29.06 grains
Loss on ignition of total solids	160.0 "	9.35 "
Oxygen consumed	17.0 "	0.99 "

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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181 Plaintiff's Exhibit #17
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch
Mutual Building, Kansas City, Missouri

Date August 21, 1929 Laboratory No. 124,340

Sample Marked Water taken from creek 20 ft. above sewer outlet from Harrisonville Missouri, Imhoff tank, August 18, 1929 by E. B. Black

Analysis:

	Parts per million
Total solids	438.0
Loss on ignition of total solids	74.0
Oxygen Consumed	2.5

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING
LABORATORY,
By J. G. Hawthorne.

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182 Plaintiff's Exhibit #18
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch
Mutual Building City

Date August 21, 1929 Laboratory No. 124,341

Sample Marked Water taken from creek 60 ft. below sewer outlet from Harrisonville, Mo. Imhoff tank, August 18, 1929 by E. B. Black

Analysis:

	Parts per million
Total solids	540.0
Loss on ignition of total solids	204.0
Oxygen consumed	38.5

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING
LABORATORY,
By J. G. Hawthorne.

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183 Plaintiff's Exhibit #19
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date October 2, 1929 Laboratory No. 126,058

Sample Marked Water sample collected by E. B. Black September 26, 1929 from stream 40 ft. above outlet sewer from Imhoff tank.

Analysis:

	Parts per million
Total solids	494.0
Loss on ignition of total solids	85.0
Oxygen consumed	42.0

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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184 Plaintiff's Exhibit #20
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch
Mutual Building, City

Date October 2, 1929 Laboratory No. 126,059

Sample Marked Water sample collected by E. B. Black September 26, 1929 from stream 60 ft. below sewer from Imhoff tank.

Analysis:

	Parts per million
Total solids	598.0
Loss on ignition of total solids	210.0
Oxygen consumed	65.0

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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185 Plaintiff's Exhibit #21
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date May 5, 1930 Laboratory No. 133,240

Sample Marked Water from stream Harrisonville, Mo. 60 ft. below outfall sewer from sewage disposal plant, collected 5:25 PM 5/4/30 by E. B. Black.

Analysis:

	Parts per million	Grains per U. S. Gallon
Total solids	7.30 ppm	42.69 gr
Loss on ignition	266.0 "	15.55 "
Oxygen consumed	58.8 "	3.44 "

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By .....

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186 Plaintiff's Exhibit #22
BLF

Kansas City Testing Laboratory, (Inc.)
Kansas City, Missouri

Telephones Main 1327
Victor 1328

Office and Laboratory
700 Baltimore

Report of Analysis

For Black & Veatch

Date May 5, 1930 Laboratory No. 133,241

Sample Marked Water from stream, Harrisonville, Mo. 100 ft. above outfall sewer from sewage disposal plant, collected 5:18 PM 5/4/~~31~~ by E. B. Black

Analysis:

	Parts per million	Grains per U. S. Gallon
Total solids	594.0 ppm	34.74 gr.
Loss on ignition	163.0 "	9.53 "
Oxygen consumed	17.6 "	1.02 "

Remarks:

Respectfully Submitted,

KANSAS CITY TESTING LABORATORY,
By J. G. Hawthorne.

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187 During the course of the direct examination of the witness, W. B. Rollins, Mr. Barnett, for the defendant, offered in evidence defendants' Exhibit B, previously marked by the reporter and identified by the witness, page one, as a map of Harrisonville, showing the arrangements of the sewer system, page two, as a plan of the disposal plant and page three, as a section of the main part of the Imhoff tank. Said Exhibit B is hereto attached as follows:

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

191 During the course of the direct examination of the witness, John R. James, Mr. Barnett, for the defendant, offered in evidence Exhibits E and F, previously marked by the reporter and identified by the witness. Exhibit E as a picture taken over the outlet of the sewer and Exhibit F as a picture taken above the stream from the outlet.

194 At the close of the evidence Mr. Barnett, for defendant, among other exhibits offered in evidence defendants' Exhibits I and J. I having been previously identified by the witness, Hawthorne, as an analysis of certain samples of water brought to the witness on June 4, 1929, said exhibit being hereto attached.

Defendant's Exhibit "I".

"Kansas City Testing Laboratory, (Inc.)

Kansas City, Missouri.

Telephone Main 1327
Victor 1328.

Office and Laboratory
700 Baltimore.

Report of Analysis.

For Cleary & Barnett,

1118 Scarritt Building, Kansas City, Missouri.

Date June 12, 1929 Laboratory No. 121575 -6-7-8-9- 80

Sample Marked Water.

Analysis:

Lab. No.	Mark	Suspended Solids (parts per million	Dissolved Solids (parts per million)	Chlorides parts per Million	Nitrites
121575	"A"	147.6	336.0	16.0	Small amount
121576	"B"	263.2	524.0	34.0	Large amount
121577	"C"	113.9	370.0	14.0	Small amount
121578	"D"	116.5	404.0	12.0	Small amount
121579	"E"	125.4	436.0	18.0	Moderate amount
121580	"F"	125.0	472.0	16.0	Large amount

Remarks:

Respectfully submitted,

KANSAS CITY TESTING
LABORATORY,
By J. G. Hawthorne."

The following is a summary of the contents of Exhibit J consisting of pages 1 to 5 inclusive and identified by the witness, Hawthorne, as a correct analysis of water left with him in September.

Summary of Exhibit J

	Distance from outlet	Total solids (parts per million)	Chlorides (parts per million)	Free Ammonia (parts per million)	Albuminoid Ammonia (parts per million)	Oxygen Consumed (parts per million
1.	95 ft below	520.00	50.00	0.10	0.30	35.00
2.	190 ft below	520.00	44.00	0.05	0.18	38.00
3.	30 ft below	660.00	70.00	2.50	1.00	73.00
4.	95 ft below	582.00	68.00	3.00	0.80	73.00
5.	230 ft below	490.00	48.00	3.10	1.00	40.00
6.	560 ft below					

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195 (Approval of Statement of Evidence by District Judge.)

It is hereby certified that defendant, City of Harrisonville, Missouri, appellant from the decree of this court did on the 10th day of November, 1930, in due form lodge with the clerk of this court its narrative statement of the proceedings had and of the evidence offered upon the trial of the case consisting of some 96 typewritten pages; that thereafter at the request of plaintiff in this cause, appellee in this appeal, the said plaintiff and the said defendant, City of Harrisonville, Missouri, prepared the foregoing as a substitute statement of the proceedings had and of the evidence offered upon the trial of the case, substantially all of the verbatim report of the evidence and proceedings included therein being included at the request of the plaintiff and appellee and all of such passages being included by direction of the court; that the court has granted leave to the appellant and appellee upon their joint request to substitute herein the foregoing statement of the proceedings had and of the evidence offered upon the trial of the case for that statement thereof heretofore lodged in this court by the appellant on said 10th day of November, 1930. The court further certifies that the foregoing statement of the proceedings had and of the evidence offered upon the trial of the case is a true, complete and properly prepared statement of such proceedings and such evidence.

ALBERT L. REEVES,
Judge of the District Court of the Western Division of the Western District of Missouri.

(Stipulation of Counsel Approving Statement of Evidence.)

It is hereby stipulated between the plaintiff and appellee, W. S. Dickey Clay Manufacturing Company, and defendant and appellant, City of Harrisonville, Missouri, that the foregoing statement of the proceedings had and of the evidence offered upon the trial of the case was prepared by the parties hereto jointly at the request of plaintiff and appellee as a substitute for a statement of the proceedings had and
196 of the evidence offered upon the trial of the case heretofore lodged in narrative form by appellant with the clerk of this court on the 10th day of November, 1930, and that substantially all of the verbatim report of such proceedings and evidence which is included herein is thus included at the request of said plaintiff and appellee, and that the appellant and appellee submit the foregoing statement of the proceedings had and of the evidence offered upon the trial of the case as a substitute for the said statement formerly lodged herein by the appellant and request that it be thus submitted by the court and that it be approved by the court as a true, complete and properly prepared statement of the proceedings had and of the evidence offered upon the trial of the case, and further agree that such delays as have occurred in the preparation and submission of the foregoing statement have been by mutual consent and by the agreement of appellee to waive any objections on its part on account of such delay.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff and Appellee
W. S. Dickey Clay Manufacturing Co.

RAYMOND G. BARNETT,
Attorney for defendant and appellant City of Harrisonville, Missouri.

Filed in the United States District Court June 15, 1931.

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197 Bond on Appeal.

Know All Men by these presents that we, City of Harrisonville, Missouri, as principal and American Surety Company of New York as [securities], of the County of Cass, State of Missouri, are held and firmly bound unto W. S. Dickey Clay Manufacturing Company in the sum of $5,000.00, lawful money of the United States to be paid to it and its successors and assigns; to which payment well and truly to be made we

bind ourselves and each of us jointly and severally, and each of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 15th day of April, 1931.

Whereas, the above named City of Harrisonville, Missouri, has prosecuted an appeal to the Circuit Court of Appeals of the United States Eighth Circuit, to reverse the judgment and decree of the District Court for the Western District of Missouri, in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named City of Harrisonville, Missouri, shall prosecute its said Appeal to effect and answer all costs and damages if it fail to make good its plea then this obligation shall be void; otherwise to remain in full force and effect.

CITY OF HARRISONVILLE,
By Lee Spicer, Mayor.

Attest: C. V. Lynch
City Clerk.

AMERICAN SURETY COMPANY
OF NEW YORK,
(Seal) By W. R. Evans
(W. R. Evans) Resident Vice President

Attest: Vivian Estes. (Seal)
(Vivian Estes) Resident Asst. Sec'y.

Bond #413152-D

Approved this June 15, 1931.

ALBERT L. REEVES,
District Judge.

Filed in the United States District Court June 15, 1931.

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198 Supplemental Praecipe for Transcript.

To the Clerk of the Above Entitled Court:

In view of the filings herein and of the orders of this court herein made since the filing of our original praecipe herein on the 14th day of November, 1930, in preparing for the purposes of appeal in the above entitled cause a transcript of the record therein, you will please include in addition to the documents called for in said original praecipe the following documents together with the filing marks thereon.

1. An order entered by this court November 6, 1930, enlarging the time for docketing the appeal to December 31, 1930.

2. A stipulation between the parties filed November 29, 1930.

3. An order enlarging the time of appellee to add to the narrative statement of the evidence filed November 29, 1930.

4. A stipulation between the parties filed December 19, 1930.

5. An order entered December 29, 1930, enlarging the time for docketing the appeal to February 1, 1931.

6. An order entered January 28, 1931, enlarging the time for docketing the appeal to March 1, 1931.

7. An order entered February 25, 1931, enlarging the time for docketing the appeal to April 1, 1931.

8. An order entered March 28, 1931, enlarging the time for docketing the appeal to May 1, 1931.

9. An order entered April 24, 1931, enlarging the time for docketing the appeal to June 1, 1931.

10. An order entered May 27, 1931, enlarging the time for docketing the appeal to July 1, 1931.

199 11. The statement of the proceedings had and of the evidence offered upon the trial of the case. This is really the same item designated in item 13 of the original praecipe except that this covers the substituted statement of the proceedings had and of the evidence offered upon the trial of the case, doing away with the necessity of incorporating in the transcript the original statement lodged herein with the clerk on November 10, 1930, of the proceedings had and of the evidence offered upon the trial of the case, in setting out this statement of the proceedings had and of the evidence offered upon the trial of the case please include not only the court's certificate at the end thereof but the stipulation between the parties immediately following that certificate.

12. The stipulation between the parties filed June 15th, 1931, concerning this praecipe and certain other matters.

13. The appeal bond for $5,000.00 filed herein and approved by the court June 15th, 1931.

14. A copy of this supplemental praecipe.

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for City of Harrisonville, Missouri, defendant herein and appellant on appeal.

Received a copy of the above supplemental praecipe this 15th day of June, 1931, and consent given to the filing of the same.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for W. S. Dickey Clay Manufacturing Co., plaintiff herein, and appellee on appeal.

Filed in the United States District Court June 15, 1931.

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200 (Order, June 29, 1931, Further Extending Time to File Transcript.)

Now for good cause shown the time for docketing the appeal herein and filing the record of this cause in the Circuit Court of Appeals of the United States, Eighth Circuit, is enlarged to permit the appellant herein to docket said cause and file such record with the clerk of said Circuit Court of Appeals of the United States, Eighth Circuit, on or before the 1st day of August, 1931.

ALBERT L. REEVES,
United States District Judge for the Western District of Missouri.

The above order consented to.

WINGER, REEDER, BARKER,
GUMBINER & HAZARD,
Attorneys for Plaintiff.

Filed in the United States District Court June 29, 1931.

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201 (Opinion of District Court.)

This is an action to abate or enjoin an alleged nuisance.

Plaintiff is a Delaware Corporation and is the owner of a body of land situated in close proximity to the defendant municipal corporation, The City of Harrisonville, Missouri. Such land is used for pasturage purposes and has been improved by the construction of barns, silos, et cetera, at an expense of $25,000 to $30,000. There is maintained on said premises a herd of Hereford cattle. Many of these have been registered. The entire herd has a value of approximately $20,000.

There is a stream of water whose channel runs through plaintiff's land, known as Town Creek, which flows intermittently, depending upon seasonal conditions. This stream has its origin in the environs of the defendant city. Such stream has been used for a number of years as water for the live stock on said premises.

The City of Harrisonville is a municipal corporation belonging to the Fourth Class, according to Missouri statutes. In the year 1923 said city completed the construction of a sewage system and sewage disposal plant. This involved the usual construction of sewers in the city leading to a main sewer where the sewage was collected and caused to flow into a disposal tank known as an Imhoff tank.

This is a structure scientifically designed for the purpose of reducing waste by dissolving and oxidizing raw sewage. It was designed and used in the interests of the public health. Said Imhoff tank was situated beyond the corporate limits of the city and a short distance from Town Creek. Said
202 tank was so equipped that the effluent therefrom would flow through a drain under the right of way of the defendant railroad company into Town Creek. This outlet for said effluent was but a short distance from plaintiff's land and flowed thereon.

It is alleged in the bill, in substance, that the waters of Town Creek were suitable for consumption as drinking water by live stock prior to the construction of said sewage system, but that the effluent from said Imhoff tank has so polluted and contaminated the waters thereof as to render it unfit for such use. Moreover, it is charged that offensive odors arise from putrescent raw sewage which is discharged into Town Creek. It is alleged, of course, that such sewage is carried by said stream over and across plaintiff's land and

that the odors therefrom are pervasive and diffusive for a long distance. As a result of such contamination and odors plaintiff says it suffers continual damages in the reasonable rental value of its property.

Plaintiff specifically alleges that such nuisance is temporary and that in the exercise of care and by the construction, maintenance and operation of an efficient disposal plant the pollution and contamination of said stream could be avoided and the offensive odors abated.

Plaintiff seeks an injunction only upon condition that the defendant city shall now fail or neglect to perfect its disposal plant.

The defendant railroad company by a separate answer pleads its compliance with sections of the Missouri statute which require it to permit the construction of sewers under its right of way for cities belonging to the class of
203 Harrisonville. It specially pleads Section 8787 R. S. Mo. 1919. It denies any knowledge of the claimed damages of plaintiff.

The defendant city denies the pollution or contamination of Town Creek and asserts the efficient operation of its sewage disposal plant.

The evidence on the part of the plaintiff tended to show that plaintiff acquired the real estate in question in July, 1925; that then the waters of Town Creek were polluted and contaminated and that conditions have grown worse until the present time; that much raw sewage of a putrescible nature is discharged into Town Creek and same is distributed in pools and along the shores of plaintiff's land; that cattle refuse to drink the water of Town Creek and that it affects them adversely where it comes in contact with their limbs and bodies, that is to say it causes a shedding of hair and otherwise causes the cattle to present a rough and, as the court infers, an unsightly appearance.

There was evidence from which the deduction might be made that sickness resulted to the cattle by reason of their contact with the polluted waters of Town Creek. Such pollution was carried for a considerable distance below the lands of plaintiff where other riparian owners also experienced annoyances.

Plaintiff's evidence further showed that the odors upon the stream were observable for a distance of approximately three-quarters of a mile and that the rental value of said

land for pasturage purposes was reduced from a maximum of $7.50 per year per acre to $3.17 per acre.

The testimony on behalf of the defendant city tended to show that the waters of Town Creek were not rendered unfit for consumption by animals and that the odors were
204 only such as would naturally arise from any kind of a disposal plant and that same were not ordinarily observable.

Defendants' testimony further tended to show that the rental value of said land was not more than $3 to $3.50 per acre and that Town Creek was more or less polluted and contaminated by the natural drainage of the City of Harrisonville before the installation of its sewage system.

Other facts will be stated as they become pertinent in the course of this memorandum opinion.

1. This being a serious conflict of important rights between the city and an individual, a corporation, the law applicate to the rights of each should be stated. That the city, as in the case of an individual, enjoys its riparian rights upon the shores of Town Creek cannot be successfully questioned or challenged. By this right the city can permit its drainage to flow naturally into said stream and cannot be held accountable for pollution and contamination that may result.

As a proprietor on the upper courses of the stream it cannot be denied its right of natural and inevitable use, nor can it be questioned but that the city, obedient to modern demands in the interest of public health, may construct a sewage system and, if necessity requires, cause its collected sewage to flow into Town Creek. The plaintiff as a proprietor below the said city, has the right to the use of said stream free of unnecessary contamination and pollution. If pollution and contamination become necessary in the disposal of the city's sewage, then plaintiff's remedy would be for a permanent nuisance and the defendant city would have to respond as in the case of an exercise of of the right of eminent domain.

205 2. In the case at bar the first question to be resolved is whether the city of necessity discharges its sewage into Town Creek. If so, then the case of City of Cape Girardeau vs. Hunze, 314 Mo. 438, and the case of Smith vs. Sedalia, 244 Mo. 107, would apply and plaintiff's remedy would be for damages and not for injunctive relief.

On the other hand if the defendant city can dispose of its sewage efficiently so as to preserve said stream from contamination then it has no right to contaminate and pollute the stream to the injury of the plaintiff. 9 R. C. L. Section 86.

In the case of Mining Co. vs. City of Joplin, 124 Mo. 129, the court correctly stated the law as follows:

"But a city has no right to gather its sewage together and cast it into a stream so as to injure the lower proprietor. For damages thus sustained, the lower proprietor will have an action, and in many instances injunctive relief."

In Edmondson et al vs. City of Moberly, 98 Mo. 523, the court covered the question of "necessary result" of a sewage system as follows:

"The power itself must be regarded as subject to the just limitation forbidding its exercise in such manner as to create a nuisance injurious to private rights of property where such a consequence is not a necessary result of exerting the power."

The evidence shows that the city in an effort to dispose of its sewage constructed an Imhoff tank. Admittedly, this structure can only dispose of approximately sixty per cent of the raw sewage turned into it. Concededly forty per cent was carried without treatment and discharged into
206 Town Creek. It further appears that said Imhoff tank was not efficiently operated so that the maximum benefits could be realized. The court finds from the evidence that the sewage after passing through the Imhoff tank, as a primary disposal plant, could without great expense be further treated in a secondary plant and that by such treatment the sewage of the city could be reduced or disposed of to a maximum of ninety per cent. This would reduce the sewage for practical purposes and would have the effect to abate the nuisance.

The court finds upon the evidence that the city could dispose of its sewage. This was recognized when the Imhoff tank was constructed. An engineer for the state health authorities testified that the Harrisonville sewage system is inadequate and that said city was ineffectively disposing of its sewage. Other cities, according to the testimony, similarly situated and belonging to the same class, effectively dispose of their sewage. Witnesses who resided near to or on plaintiff's land, and others who had business thereon testified in support of plaintiff's allegations.

3. The court finds from the evidence therefore that the effluent from the defendant city's sewage system pollutes and contaminates Town Creek. Whether it renders the waters wholly unfit for consumption as drinking water need not be decided. According to the overwhelming evidence, the stream was filthy and such filth adhered to the limbs and bodies of plaintiff's cattle and the odors arising were not only noticeable but extremely offensive.

The plaintiff has a right to enjoy its premises freed of these needless annoyances. It was within the power of the city, according to the evidence, to abate the nuisance.
207 This is true notwithstanding the evidence of a degree of pollution on the upper reaches of Town Creek and above the outlet of the sewer. According to the evidence the stream had some power of self purification as it flowed. Prior to the construction of the sewage system the stream was available for use and did not give off noxious and offensive odors. The court finds that the nuisance in question is not only temporary but easy of abatement.

4. Plaintiff's evidence was not controverted that it cost $3500. to remove the pollution already in Town Creek on its property. The evidence varied as to the rental value of property of the character of plaintiff's. The witnesses said that it would run from $3 up to $7.50. Plaintiff now receives $3.17 per acre.

An adjoining proprietor whose land was affected by the pollution, but not as extensively as plaintiff's property, receives $4 per acre for his land for agricultural purposes. The opinion was expressed that plaintiff's land was more desirable. The rental on said adjoining land had been until recently $5 per acre.

The court finds from all the evidence that approximately 100 acres of plaintiff's land is seriously affected by the pollution and contamination of Town Creek. The rental value was reduced $1.50 to $2 per acre. The plaintiff has owned said land for a period of five years. Its suit was filed in July 1928. Its damages therefore would aggregate approximately $500. This sum, with the cost of removing the nuisance, would amount to $4000. Plaintiff is entitled to a decree restraining the nuisance and to a money judgment in said sum. However, a final injunction will not be immediately granted. The defendant city should have a reasonable time in the interest of the health of the community to
208 reconstruct or repair its sewage system. This is proper procedure. 9 R. C. L. Sec. 87 P. 694.

The court will make no order as to what the city should do to solve its problem except that something must be done within a reasonable time. Unless, therefore, the city shall within a period of six months dispose of its sewage other than by discharging its raw sewage into Town Creek, a final injunction will be granted.

Counsel for the city argue its financial inability to bring about an effective disposal of its sewage. The Missouri Statutes appear to confer upon the authorities of the city a wide laditude in providing for emergencies of this kind. The city in the exercise of its function should be anxious to avoid disposing of its sewage in such way as to occasion needless harm and injury to the people who hold property in its environs.

The defendant railroad company is guilty of no wrong in connection with the defendant city's sewage system. It was bound to permit the construction of a sewer under its right of way. However, in the event that the city should decline to dispose of its sewage otherwise, then an injunction should be awarded against the railroad company to prohibit it from allowing the use of its right of way for the perpetration of a wrong.

Kansas City, Missouri, June 30, 1930.

ALBERT L. REEVES,
United States District Judge.

Filed in the United States District Court, June 30, 1930.

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209 (Clerk's Certificate to Transcript.)

United States of America—Set:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the praecipes filed herein and made a part hereof, in the cause wherein W. S. Dickey Clay Manufacturing Company is plaintiff and City of Harrisonville, Missouri, a Municipal Corporation, and Missouri Pacific Railroad Company, a corporation, are defendants, as fully as the same appears on file and of record in my office.

I further certify that the original Citation is prefixed hereto and returned herewith.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 30th day of June, A. D., 1931.

Seal
U. S. Dist. Court
Western Division
Western District
of Missouri.

EDWIN R. DURHAM,
Clerk U. S. District Court.
By H. C. Spaulding,
Deputy Clerk.

Filed Jun. 30, 1931. E. E. Koch, Clerk.

184 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

City of Harrisonville, Missouri, Appellant,
No. 9241 vs.
W. S. Dickey Clay Manufacturing Company.

The Clerk will enter my appearance as Counsel for the Appellant.

RAYMOND G. BARNETT,
Scarritt Bldg.,
Kansas City, Mo.

ALLEN B. GLENN,
Harrisonville, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 17, 1931.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

LELAND HAZARD.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 3, 1931.

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185 (Order of Argument.)

November Term, 1931.

Tuesday, November 24, 1931.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Raymond G. Barnett for appellant, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

(Order of Submission.)

November Term, 1931.

Wednesday, November 24, 1931.

This cause having been called for further hearing, argument was resumed by Mr. Raymond G. Barnett for appellant,

continued by Mr. Leland Hazard for appellee and concluded by Mr. Raymond G. Barnett for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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186 (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 9241.—MAY TERM, A. D. 1932.

City of Harrisonville, Missouri, Appellant,
vs.
W. S. Dickey Clay Manufacturing Company, Appellee.

Appeal from the District Court of the United States for the Western District of Missouri.

Mr. Raymond G. Barnett (Mr. Allen B. Glenn was with him on the brief), for appellant.

Mr. Leland Hazard (Mr. Maurice H. Winger and Mr. George J. Winger were with him on the brief), for appellee.

Before STONE and KENYON, Circuit Judges, and CANT, District Judge.

CANT, District Judge, delivered the opinion of the court.

The parties will be designated as in the court below, where W. S. Dickey Clay Manufacturing Company was plaintiff, and City of Harrisonville was defendant.

Plaintiff is a corporation organized under the laws of the State of Delaware. Defendant is now, and for several years last past has been, a city of about two thousand inhabitants in the State of Missouri. A small stream, known as Town Creek, flows through or near the Northerly line of said City and takes its course Westerly

and Southerly near the Westerly line thereof. During some periods, this stream is nearly, or quite dry. Prior to the year 1923, said City had no general sewer system. During said year such a system was installed. Thereby, the sewage of the City was collected and was conveyed for treatment to an Imhoff Tank, so-called, which was located near the westerly boundary of said City and closely adjacent to the stream above referred to. For some years past, plaintiff has been the owner of a considerable tract of land lying along the said Creek, and, in the main, down stream from said Tank. Said land has been, and is, used for pasturage purposes. Said tank is, and has been, only about 60% efficient in removing offensive matter from the sewage which is conducted thereto, and the effluent from the tank therefore carries about 40% of the putrescent matter originally in such sewage. Such effluent is discharged into said Town Creek and is carried by said Creek through and alongside of plaintiff's land. The sewage, so discharged into said Creek, fouls the waters of the stream and the banks thereof and offensive odors constantly arise from such waters and from the foul substances which are deposited along said bank. The introduction of such sewage into said creek renders the waters thereof unfit for drinking by the cattle which are pastured on the land referred to. By the installation of a supplementary tank, the sewage disposal system of said defendant may be so improved that the effluent therefrom would be comparatively harmless and inoffensive.

This suit was brought to obtain injunctive relief against the maintenance of the sewer system and Imhoff tank in their present imperfect state and for damages. Defendant admits that the matters complained of constitute a nuisance, but asserts that the same is permanent in its character, that the court is without power to abate the same, and that plaintiff's only remedy is an action for damages to its land on the theory that present conditions will continue indefinitely in the future. Defendant also claims that its financial condition is such that it can not install the supplementary system, which is contemplated by the decision of the trial court. It claims also, and specifically, that the award hereinafter mentioned, to plaintiff, of the item of $3500.00, on account of the estimated cost of clearing the creek bed and banks, is unwarranted.

The trial court found that something like one hundred acres of plaintiff's land have been and are injuriously affected by the offensive matter deposited in said stream, that the maintenance of said

plant in the condition in which it has been operated constitutes a temporary nuisance, which may be easily abated, that the rental value of plaintiff's lands has been reduced by said nuisance in the sum of $100.00 per annum for the period of five years immediately preceding the entry of the decree herein, and that it would cost $3500.00 to remove the offensive matter from along the banks of said stream in its course along and through the lands of plaintiff. An injunction was therefore ordered and it was adjudged that plaintiff recover from defendant the sum of $4,000.00, of which $500.00 should be for the diminished rental or usable value of plaintiff's lands throughout the said period of five years, and $3500.00 should be the estimated expense of removing offensive matter from the bed and banks of said creek.

The fact that the sewage system and the Imhoff tank in question were installed pursuant to the direction of the governing body of the City does not place them beyond judicial control. *Carmichael* v. *Texarkana*, 94 Fed. 561, 570-574. Approved in case of same title at 116 Fed. 845, 849, (C. C. A. 8). *Winchell* v. *City of Waukesha*, 110 Wis. 101. *Seifert* v. *City of Brooklyn*, 101 New York 136, 139, et seq., 143 et seq.

A city is not authorized or justified in so collecting and discharging the sewage therefrom as to cause unnecessary injury to private persons. *Carmichael* v. *Texarkana*, 94 Fed. 561; also 116 Fed. 845, 849. (C. C. A. 8.) *Jones* v. *Sewer Improvement District*, 119 Ark. 166; *Morse* v. *City of Worcester*, 139 Mass. 389; *Chapman* v. *City of Rochester*, 110 N. Y. 273; *Winchell* v. *City of Waukesha*, 110 Wis. 101; *Edmondson, et al.* v. *City of Moberly*, 98 Mo. 523.

The nuisance here in question, being such as might be abated by order of court, is temporary in character, *Foncannon* v. *City of Kirksville*, 88 Mo. App. 279, 284; *Pinney* v. *Berry*, 61 Mo. 359, 367; *Ready* v. *Mo. Pac. Ry. Co.*, 98 Mo. App. 467, 470, and plaintiff is entitled to injunctive relief. *Carmichael* v. *Texarkana*, 94 Fed. 561, 571, 573, 574; also 116 Fed. 845, 849, (C. C. A. 8); *Missouri* v. *Illinois and Chicago District*, 180 U. S. 208, and authorities cited at pages 245-247; *Winchell* v. *City of Waukesha*, 110 Wis. 101; *Haskell* v. *New Bedford*, 108 Mass. 208, 216, et seq.

In all cases of nuisance, as well as of other torts, and aside from the right to punitive damages in certain cases, the person sustaining the injury is entitled to recover such sum as will fairly compensate

him for all detriment of every kind which he has suffered and which is traceable proximately to the wrong of which he complains. This detriment or injury may often be of various kinds. He is entitled to be made whole. He is not entitled to any excess or profit. In this respect, whatever is right and just should be done.

In cases of permanent nuisance affecting real estate, the measure of damages usually is the difference between the value of the land which is involved immediately before the imposition of the nuisance and the value of the same land immediately after such imposition, having in mind that the conditions are to remain permanent. *Pinney* v. *Berry*, 61 Mo. 359, 367; *St. Louis Trust Company* v. *Banbrick*, 149 Mo. 560, 569, 570; *Conklin* v. *City of Des Moines*, 184 Iowa, 384, 387; *Foncannon* v. *City of Kirksville*, 88 Mo. App. 279, 284.

In case of a nuisance which is properly classified as permanent, and which affects real estate, if, by the expenditure of money, the property can be restored to substantially the same condition in which it was before the nuisance was imposed, and if the cost of such restoration would be less than the difference in the values of the property before and after it was affected by the nuisance, then, manifestly, since the question is one of compensation, and of putting the owner in as good a position financially as he was before his property suffered from the nuisance, the true measure of damage would be the cost of such restoration. *Seely* v. *Alden*, 61 Pa. St. 302, 306; *Heath* v. *Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 126 Minn. 470.

In cases of temporary nuisance affecting real estate, the rule ordinarily applicable is that the plaintiff is entitled to recover the difference between the rental or usable value of the land as it would be without being subjected to the nuisance, and such value with the lands subject thereto. *Pinney* v. *Berry*, 61 Mo. 359, 367, 368; *Ready* v. *Mo. Pac. Ry. Co.*, 98 Mo. App. 467, 470; *Smith* v. *The Kansas City, etc. Ry. Co.*, 98 Mo. 20, 25.

In some cases the foregoing rule would not afford full compensation. Under some circumstances, a temporary nuisance may cause specific damage to buildings or other property. In such cases, the rule of compensation would often require that such damage be repaired or that offensive objects be removed. This, in addition to the recovery of the rental or usable value of the land, might be the obviously practical, prudent, and economical way of restoring the

owner of such land to his former condition. In some cases where continuing injury is threatened, it might be necessary to incur expense in abating the nuisance. In such cases, the reasonable cost of such repairs, removal, or abatement might properly be recoverable as a part of the damages actually sustained. *Emery* v. *Lowell*, 109 Mass. 197, 201; *Shaw* v. *Cummiskey*, 7 Pick. 76, 78; *Pinney* v. *Berry*, 61 Mo. 354, 367; *Krebs* v. *Construction Co.*, 144 Mo. App. 649, 653; *Toebbe* v. *City of Covington*, 145 Ky. 763, 768, 769; *Watson* v. *Miss. R. P. Co.*, 174 Iowa 23, 38. But in no case should a defendant be required to pay more than just compensation. This must always be the limit of the recovery. Therefore, if for special reasons, the necessary expense of such repairs, removal, or abatement would be out of all proportion to the benefits which would accrue therefrom, such expense should not be incurred and some other and more reasonable basis for estimating the true amount of compensation should be employed.

In some cases of nuisance, both temporary and permanent, certain special features such as the injurious effect of the nuisance upon the health of the plaintiff, or of his family, or the fact that the nuisance may have injured the health, or caused the death of domestic animals, and also other injuries peculiar to the specific case, must sometimes be considered. As already stated, whatever the character of the injury, if the same be traced to the nuisance as the proximate cause, plaintiff is entitled to compensation on account thereof. Unless the deposit of foul matter in the bed of the creek here in question and along the bank thereof is to be spelled out as such a special feature, we have none to deal with in this case. Such deposits, however, is what, in part, constitutes the nuisance here. The cause of such nuisance is the sewer system and the Imhoff tank, which have been referred to, and they may be considered and are a part of the nuisance itself.

The ordinary rules as to the measure of damages apply in this case.

Where, as here, both equitable relief by abatement, and the recovery of damages, are sought in the same action, damages sustained up to the time of the trial may be awarded. *Karns, et al.*, v. *Allen, et al.*, 135 Wis. 48, 59; *Gasse* v. *Development & Funding Co.*, 135 N. Y. S. 732.

It is sometimes difficult to determine whether a nuisance is temporary or permanent in its character. *Toebbe* v. *City of Covington*, 145 Ky. 763, 768, 141 S. W. 421, 423. There are authorities

which hold that under some circumstances the plaintiff has a right to elect as to which class a nuisance shall be assigned. If there were reasonable ground for difference of opinion as to whether the nuisance here in question is temporary or permanent, the court should be slow to hold the same to be permanent, except at the election of plaintiff, because the effect of such holding would be to confirm in defendant, permanently, the benefit of its own unlawful act, and, in effect, would be legalizing the original wrong of which complaint is made. Upon this phase of the case, the trial court was entirely right. In this case, however, with the installation of a supplementary tank, the condition of the creek will tend to correct itself. The effluent from the tank, then much purified, the rainfall from time to time, and the other forces of nature will all combine to restore the creek to substantially the same state in which it was before the construction of the Imhoff tank. Such elements were considered and such view taken in *City of San Antonio* v. *Mackey*, (Texas, 1896), 14 Tex. Civ. App. 210, 214, 36 S. W. 760. In that case the question of the removal of offensive matter was considered, and there being no contention that the cost of such removal would be prohibitive or unreasonable, it was held that such expense was properly chargeable to the wrongdoer. About this, under such circumstances, there could be no serious question.

As will be seen, this does not mean that the cost of removal is the correct measure of damages in all cases which may arise.

A case much more directly in point, both in its bearing upon the character of the nuisance here and upon the proper measure of damages is *Sussex Land & Live Stock Co.* v. *Midwest Refining Co.*, 294 Fed. 597, 604-609, (C. C. A. 8).

Following the case last cited, the allowance to plaintiff of the sum of $500.00 as the diminished rental value or usable value of plaintiff's lands for the five year period last before the entry of the decree was proper. Since the entire harmful effects of the nuisance in this case are reflected in the diminished rental or usable value of the lands, and since plaintiff has the right to bring successive actions if it shall develop that the further or continuing injuries which are threatened to said lands shall actually occur, it well may be that the allowance last above referred to is the limit which may be awarded to plaintiff in this case. Assuming the nuisance to be temporary, as determined by the trial court, the right to bring such separate actions cannot be questioned.

The propriety of allowing the item of $3500.00 as damages under the rather unusual circumstances of this case is more than doubtful. As already noted, the cost of abating a nuisance or of removing material from lands where such material is thereon as the result of trespass or encroachment, whether as the result of nuisance, or otherwise, may sometimes be considered; but for the reasons which will shortly be stated here, it is reasonably clear that this can not be such a case.

It is reasonably clear that in this case, and in various others which may be supposed, the cost of removal, used as a measure of damages, would work a manifest injustice. As already stated, the finding of the trial court is that the total annual damage sustained by plaintiff on account of the nuisance in question is $100.00. If the award of $3500.00 is to stand, plaintiff will be under no obligation to use the same in clearing out the creek and would be most unwise if it should make such use thereof; but it will thereby be provided with a fund, which, at interest rates which are reasonably current, will provide an annual income of $210.00, without abatement of the principal and with the right to bring other suits for damages from time to time in the future as such rights may accrue. The amount of such annual income which may be so realized will be more than twice the amount of the annual damage which up to the time of the trial had been caused by said nuisance to the lands in question. If, by way of illustration, we assume that the expense of clearing out the stream, instead of being $3500.00, would be twice that sum, then, under the rule which has been applied in this case, the amount to be awarded to plaintiff as the estimated cost of abating the nuisance would perhaps be more than the value of all of its lands which are involved here; or if the finding were that the annual damage to plaintiff's lands by reason of the nuisance was the sum of $50.00 only, it would be quite apparent that there must be something wrong in awarding the sum of $3500.00, or in the case supposed, of $7,000.00, as the estimated cost of clearing out the stream and as a real item of damage which the plaintiff had sustained in addition to the loss in the rental value or the usable value of the land in question. By the application of such a rule, we, conceivably, might award a plaintiff in such a case, a sum greatly in excess of the value of all of his lands, while he still retained the ownership and was able to make a very substantial use thereof. Expenditures for removals, repairs and abatement in such cases, in order that they may be chargeable against a defendant, and serve as a proper measure

of damages, must be reasonably necessary under the circumstances. They must be made in the exercise of ordinary prudence and economy, and in the course of what is a reasonably practicable and proper treatment of the situation, having in mind the damage which has been sustained, and the benefit which will accrue to the land owner by the expenditures proposed. This would be compliance with the rule requiring the payment of just compensation. Any substantial departure therefrom would not.

To take a somewhat analogous case, by way of further illustration, we may assume that in carrying on blasting operations, great quantities of rock from the face of a precipitous cliff might be cast upon the immediately adjacent land of a third person. Whether this be a nuisance or shall be given some other name, it is a tort, and there can be but one measure of damages, whatever shall be the name applied. The land itself might be worth a nominal amount only. Let us say that it would be entirely feasible to remove all the rock, but only at a great expense. The land might be worth quite as much to the owner after the rock was thrown thereon as it was before.

To use the cost of removal as the invariable measure of damages in such cases, the plaintiff, often, would be placed in a much better position financially than if there had been no nuisance or no encroachment. It would be much to his advantage to have the nuisance developed, if only the person responsible therefor were financially able to pay such damages as might be assessed against him under such rule. It is apparent that in such cases the cost of removal has no necessary and direct relation to the amount of the loss which the plaintiff has sustained, or to the benefits, if any, which would accrue to him if such expenditure were made, and for that reason, such cost is not always the proper measure of damages to apply. If such measure were adopted, the plaintiff often would receive a sum much greater than the loss he had sustained. He would be getting much more than a fair compensation. It is reasonably clear that this would be the situation here if the item of $3500.00 were allowed.

In this case the ordinary rule of allowing as damages the diminution in the rental or usable value of the land, together with the right to bring successive actions for damages, will afford ample and accurate compensation for the wrongs of which plaintiff complains.

An examination of the statutes of Missouri indicates that the financial difficulties which defendant claims would render it impossible to comply with the decree herein, are not insurmountable.

After preparation of the opinion herein, attention has been called to the case of *Kent* v. *City of Trenton*, 48 S. W. (2d) 571. (Kansas City Court of Appeals). Upon any one of two or more grounds specified in the opinion, that case was rightly decided. It has been called to the attention of this court because of the statements therein as to the character of the nuisance there involved. In reliance upon the numerous authorities hereinbefore cited, including certain cases decided by the federal courts in this Circuit, we adhere to the views hereinbefore expressed.

The decree should be modified by eliminating therefrom the item of $3500.00 allowed to plaintiff therein, and, as so modified, should be affirmed. Let the appellant pay one-third of the costs in this court and let the appellee pay two-thirds thereof.

Filed August 5, 1932.

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196 (Decree.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1932.

Monday, August 8, 1932.

City of Harrisonville, Missouri, Appellant,
No. 9241 vs.
W. S. Dickey Clay Manufacturing Company.

Appeal from the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, modified by eliminating therefrom the item of Three Thousand Five Hundred and no/100 ($3,500.00) Dollars allowed to the Plaintiff, the W. S. Dickey Clay Manufacturing Company, and as thus modified the said decree is hereby affirmed.

It is further ordered that the Appellant, City of Harrisonville, Missouri, pay one-third of the costs and the Appellee, W. S. Dickey Clay Manufacturing Company, pay two-thirds of the costs on the appeal in this Court.

August 8, 1932.

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197 In the United States Circuit Court of Appeals,
Eighth Circuit.

May Term, A. D., 1932.

City of Harrisonville, Missouri, Appellant,
No. 9241 vs. In Equity.
W. S. Dickey Clay Manufacturing Company, Appellee.

Appealed from the District Court of the United States for the Western District of Missouri.

Petition for Rehearing.

Now comes the appellant herein, City of Harrisonville, Missouri, and petitions the court for a rehearing of this cause upon the ground that the court, as shown by its opinion, has inadvertently overlooked the following material matters of law and fact:

1. The matter of law announced as Point VI, page 27 of appellant's brief, reading as follows:

"An alleged nuisance serving a public interest, the enforced abandonment of which must work great public
198 harm, will not be enjoined upon the complaint of a private individual of mere property damage. The land owner is left to his right of recovery of original damages as for a permanent nuisance."

2. The matter of law announced as Point VII, page 27 of appellant's brief, reading as follows:

"An order in effect requiring the defendant City to make an expenditure equal to the total damages which would be suffered by the plaintiff, its successors and assigns, on account of the alleged nuisance over a period of 340 years is unreasonable and in violation of all principles of equity."

3. The matter of law announced in the double-barreled definition of a permanent nuisance in Point II (a), page 24 of appellant's brief, as follows:

"(a) A permanent structural nuisance is one that will continue without change from any cause but human labor.

Or it may be one which cannot be abated without adversely affecting the public interest."

4. The matter of law announced in Point IV (b), page 26 of appellant's brief, reading as follows:

"(b) It (the court) has no such right (the right to require city officials and electors to exercise legislative powers in favor of the erection of a secondary disposal plant), particularly, where a favorable exercise of such discretion could only operate in violation of the state constitution and statutes limiting city expenditures. The court is as much bound by the constitution and statutes as the city officals and the voters. An erection of a secondary disposal plant was legally beyond the financial capacity of the City (1) at the time the plant was erected, and (2) continued so to be up to the time of the trial of this case."

5. The matter of fact that appellant contests the creation of a nuisance by said sewer system and Imhoff tank. The court in the third paragraph of its opinion in referring to the sewer system and Imhoff tank says:

"Defendant admits that the matters complained of constitute a nuisance, but asserts, etc."

199 Appellant, on the contrary, in Point I (b), page 24 of its brief, said:

"Plaintiff has failed to show that the City by the construction and operation of its sewer has added materially to the contamination already present in Town Creek."

This position is reiterated throughout the brief.

6. The matter of fact that the remedy proposed by the plaintiff is not that of a supplementary tank, as referred to in the court's opinion, but that of a supplementary plant costing $30,000.00, more than half the cost of the entire Harrisonville sewer system in the construction of which it exhausted its debt-making power for such purpose.

Respectfully submitted,

RAYMOND G. BARNETT,
ALLEN B. GLENN,
Attorneys for Appellant.

Certificate of Counsel.

I, Raymond G. Barnett, of Kansas City, Missouri, regularly admitted to practice in the United States Circuit Court of

Appeals for the Eighth Circuit, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith, and in my opinion is well founded, and is not presented for the purpose of delay.

September 2nd, 1932.

RAYMOND G. BARNETT.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 6, 1932.

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200 (Order denying Petition for Rehearing.)

October Term, 1932.

Wednesday, October 5, 1932.

This cause came on this day to heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby denied.

October 5, 1932.

(Petition to Stay Issuance of Mandate.)

Now comes the appellant in the above entitled cause, and prays the court to stay the issuance of the mandate herein for the reason that appellant intends to make application in the above-entitled cause to the Supreme Court of the United States for the issuance herein of its writ of certiorari, to which end appellant will without delay file in the Supreme Court of the United States its petition and brief for the issuance of such writ and a certified copy of the record herein.

RAYMOND G. BARNETT
ALLEN B. GLENN
Attorneys for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 24, 1932.

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201 (Order Staying Issuance of Mandate.)

October Term, 1932.

Friday, October 28, 1932.

On Consideration of the motion of appellant for stay of the mandate in this cause pending a petition to the Supreme

Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

October 28, 1932.

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202 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the City of Harrisonville, Missouri, was Appellant, and the W. S. Dickey Clay Manufacturing Company was Appellee, No. 9241, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirty-first day of October, A. D. 1932.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 23, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.